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FIRST DEAN OF THE SCHOOL

**By his Wife and Daughter**

**A. M. BOARDMAN and ELLEN D. WILLIAMS**

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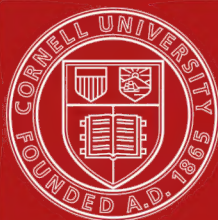
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The law of mortgage and other securities



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THE LAW  
OF  
MORTGAGE  
AND  
OTHER SECURITIES UPON PROPERTY.

BY  
WILLIAM RICHARD FISHER,  
OF LINCOLN'S INN, BARRISTER-AT-LAW.

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## ERRATA ET ADDENDA.

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Page 601, note (h), line 4, for "110," read "112."

„ 611, note (e), remove "*Shepherd v. Titley*" to, from note (f).

note (f), *dele* "*Rose v. Watson*," with its references; *add* "*Brace v. Duchess of Marlborough*, 2 P. W. 491."

„ 686.—To note (m) *add* "*Gray v. Downman*, 27 L. J., N. S., Ch. 702."

„ 702.—To line 4 *add* "Or if the Company are themselves the principal mortgagees, to insist that the policy was void, and to throw the debt upon the other securities. *White v. British Empire, &c. Assurance Co.*, L. R., 7 Eq. 394."

# THE LAW OF MORTGAGE

AND

## OTHER SECURITIES UPON PROPERTY.

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### CHAPTER VII.

#### OF THE PRIORITIES OF INCUMBRANCERS.

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PART 1.—OF LEGAL PRIORITY, AND HEREIN OF DEFECTIVE ASSURANCES AND THE DOCTRINE OF TACKING.

PART 2.—OF EQUITABLE PRIORITY, AND HEREIN OF THE RIGHT TO CONSOLIDATE SEVERAL SECURITIES.

PART 3.—OF PRIORITY UNDER SECURITIES UPON CHATTELS PERSONAL AND CHOSSES IN ACTION, AND UPON SHIPS UNDER THE MARITIME LAW.

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#### PART I.

981. *Of Priority under Defective Assurances.*

992. *Of the Effect of the Legal Estate and the Tacking of Securities.*

979. THE ownership of the legal interest, the dates of the several incumbrances, and the existence of notice, fraud, neglect, or misconduct, are the matters chiefly to be inquired into in settling the priorities and other rights of the persons who claim interests in the incumbered property.

980. It is an established general rule, that he who has the first mortgage, having the legal estate, shall prevail before all other mortgagees and incumbrancers (*a*). There-

(*a*) Bac. Abr. Mortg. E. 3. As, in this respect, equity followed the law, the rule is not affected by the Judicature Act, 1873, s. 25 (11).

fore a puisné mortgagee, without notice of a prior mortgage, and who acquires a legal title by getting in an outstanding term, may recover in ejectment against the first mortgagee; and if the owner of the equitable fee mortgages and afterwards acquires the legal estate, and mortgages again without notice, the last mortgagee shall prevail (*b*). A mortgagee, who obtains legal priority, shall also have priority in equity; though, by his delay in completing his legal title, a subsequent incumbrancer has obtained a *quasi* legal title; if the delay were not from negligence or fraud;—as where (*c*) a prior mortgagee of copyholds took a conditional surrender which was presented by the homage, but the enrolment was delayed till after the enrolment of the security of a later incumbrancer, who was without notice, and there was no custom limiting the time for presenting the surrender; the first mortgagee being found by a court of law to have legal priority, it was held that equity would follow the law.

*Of Priority under Defective Assurances.*

**981.** If a mortgage, valid in equity, be defective as to its intended legal operation,—as a feoffment for want of livery, or a surrender of copyholds for want of presentment, equity will make good the defect against the mortgagor; and will give the mortgagee priority as against those who stand in the place of, and take subject to, the same equities as the mortgagor. It has therefore supplied the want of presentment of a surrender of copyholds, not made within the time limited by custom and statute, as against the assignees of the bankrupt mortgagor (*d*). And so as against persons [claiming under the heir (who is liable, in conscience, to make good the defective security), and who have not originally lent their money on the security of the land, as bond creditors of the ancestor to whom the heir has confessed judgments, equity will make good an imperfect security (*e*). But no relief will be given to a prior mortgagee

(*b*) Goodtitle *v.* Morgan, 1 T. R. 755; Right *d.* Jefferys *v.* Bucknall, 2 B. & Ad. 278.

(*c*) Horlock *v.* Priestly, 2 Sim. 75.

(*d*) Taylor *v.* Wheeler, 2 Vern. 565.

(*e*) Burgh *v.* Francis, 1 Eq. Ca. Abr. 320; Bac. Abr. Mort. E. 3. But where

or judgment creditor, where the subsequent security is a mortgage duly executed without notice of the other, for the latter mortgagee has then as good an equity as the earlier one, and a better than a judgment creditor, as having lent his money on the land; and has a legal title also, not to be overturned in equity by a defective security incapable of prevailing at law (*f*).

So where copyhold lands, subject to a covenant to surrender, made for valuable consideration, were afterwards surrendered to a mortgagee without notice of the former covenant, the surrenderee was not postponed (*g*); for he had a legal title, and equal equity as having lent his money on the land.

**982.** And where all the interests are equitable and the first defective, no help will be given against the latter incumbrance. Therefore, where a recognizance, the time for the inrolment of which had elapsed, had been inrolled by special order, which gave it effect from its date; preference was given (*h*) to a judgment creditor after the date, but before the inrolment of the recognizance: in regard that the estate being subject to a legal mortgage, it could be reached by neither security without the aid of equity (*i*). And in another case (*h*) it was said, that the court always gave leave to inrol a recognizance after the proper time, with caution, so as not to prejudice any intervening purchaser (**602**).

**983.** If the mortgagor's title be altogether defective, and he afterwards acquire a good title, the new title may be applied to make good the defective conveyance (*l*).

a person sold as heir-at-law, not being so, and afterwards the estate descended on him, and he died, not having confirmed the title, Eyre, C. B., thought that, though the conveyance could have been made good against him, the equity was personal, and could not be enforced against the heir. But the bill was dismissed on other grounds. (*Morse v. Faulkner*, 1 Anst. 11.)

(*f*) Bac. Abr. Mortg. E. 3.

(*g*) *Oxwick v. Plumer*, id.; and mentioned 2 Vern. 636.

(*h*) *Fothergill v. Kendrick*, 2 Vern. 234; and see 1 Atk. 191.

(*i*) For which the maxim *Actus curiæ nemini facit injuriam* might have been relied upon.

(*h*) *Bothomley v. Fairfax*, 2 Vern. 750; 1 P. Wms. 334.

(*l*) *Smith v. Baker*, 1 Y. & C. C. C. 223; *Taylor v. Debar*, 1 Ch. Ca. 274;

The mortgagor's covenant for further assurance does not oblige him to release his equity of redemption, but only to make such assurance as will support the mortgage (*m*).

**984.** Where all the actual interests of the conveying parties have clearly passed by the deed, the security will be supported, though the nature of the parties' interests was misunderstood. Thus, where there was a mortgage under the Fines and Recoveries Act, by persons supposing themselves to be tenant for life and tenant in tail, the deed being sufficient to pass all their interests, and effectual to bar estates tail, the heir of the supposed tenant for life was not allowed (*n*) to set up a title, on the ground that his ancestor, being in fact tenant in tail, the deed had miscarried,

**985.** Defective assurances by tenants in tail have been the subject of modern legislation; prior to which, however, if a tenant in tail, either in possession or remainder (*o*), had made a disposition or created an estate voidable by the issue (*p*); yet, if he afterwards levied a fine, or suffered a recovery, though to a subsequent mortgagee or purchaser, or for a different purpose, the first operation of the fine or recovery was to give effect to the antecedent act, even against the subsequent declaration of the tenant in tail; the fine worked a confirmation, whether the prior instrument were a legal conveyance or an equitable charge (*q*). But not, it is said (*r*), where, the prior charge being equitable, a legal interest was afterwards conveyed to the subsequent purchaser or mortgagee without notice of the prior charge.

**986.** And so now by statute (*s*), where a voidable estate

2 *id.* 212; *Seabourne v. Powell*, 2 Vern. 11; see per Lord Cranworth, C., *Smith v. Osborne*, 6 H. L. C. 390.

(*m*) *Atkins v. Uton*, 1 Ld. Raym., 36; Comb. 318.

(*n*) *Evans v. Jones, Kay*, 29.

(*o*) *Freem*. 310.

(*p*) *Machell v. Clarke*, 2 Raym. 778; *Tyrrell v. Mead*, 3 Burr. 1705.

(*q*) *Hunt v. Gateler*, Poph. 5; S. C. nom. *Capel's case*, 1 Co. 151; *Tourle v. Rand*, 2 Bro. C. C. 652; *Tyrrell v. Mead*, *supra*; *Lloyd v. Lloyd*, 4 Dru. & War. 354; *Beck v. Walsh*, 1 Wils. 276.

(*r*) *Powell, Mort.* 165-6.

(*s*) 3 & 4 Will. 4, c. 74, s. 38.

is created by a tenant in tail of lands under a settlement, in favour of a purchaser for valuable consideration, a subsequent disposition by the tenant in tail of the same lands (except by certain leases, s. 41), whatever its object, and whatever the extent of the estate intended to be created, will, if made with the consent of the protector of the settlement, where there is one, confirm the voidable estate to its full extent; but if the protector do not consent, the voidable estate will be confirmed only so far as the tenant in tail could confirm it without the protector's consent. In either case, the voidable estate will not be confirmed as against the person who takes under the subsequent disposition, or those claiming under him, where he is a purchaser for valuable consideration without *express* notice of the voidable estate.

987. And in case of the bankruptcy of the tenant in tail, it is provided (*t*), that a voidable estate created in favour of a purchaser for valuable consideration, by an actual tenant in tail, or by a tenant in tail entitled to a base fee, who shall afterwards become bankrupt, shall be confirmed by the subsequent disposition of the trustee to its full extent, as against all persons except those whose rights are saved by the act, if there shall be no protector, or being one, if he shall consent to the disposition; and whether the trustee may have made a previous statutory disposition or not, or whether a prior sale or conveyance shall have been made or not, under prior or subsequent bankrupt acts; but to the extent only to which the actual tenant in tail before his bankruptcy could have confirmed the voidable estate, without the consent of the protector, where (in the case of an actual tenant in tail) there shall be a non-consenting protector; and the voidable estate shall also be confirmed to its full extent, against all persons except those whose rights are saved by the act, where at any time after the trustee's disposition, whilst only a base fee shall be subsisting, there shall cease to be a non-consenting protector.

(*t*) 3 & 4 Will. 4, c. 74, s. 62; Bankruptcy Act, 1869, s. 25 (4).

And in all these cases also, the voidable estate shall not be confirmed as against the person who takes under the subsequent disposition of the trustee, or those claiming under him, where he is a purchaser for valuable consideration without *express* notice of the voidable estate.

**988.** The acts of the bankrupt tenant in tail are void as against the disposition of the bankruptcy trustee, where they would have been void against the creditors if the bankrupt had been seised in fee: but the bankrupt's powers of disposition remain in him, subject only to the powers of the trustee and the rights of all persons claiming under him. And the trustee's disposition of the lands of a bankrupt, being actual tenant in tail, or tenant in tail entitled to a base fee, will be as valid and effectual when the bankrupt is dead, as when he is living at the time of the disposition, in case at the time of his death there shall be no protector of the estate tail or base fee, or in case (where the bankrupt was actual tenant in tail) there shall be issue inheritable, and no protector or a consenting or non-consenting protector; or in case (where the bankrupt was tenant in tail entitled to a base fee) there shall be issue, who, if the base fee had not been created, would have been actual tenant in tail, and either no protector or a consenting protector of the settlement (*u*). The court has refused, in a suit for specific performance of a covenant for further assurance, to compel the bankrupt to exercise the power of disposition reserved to him by s. 64, by enlarging the estate conveyed by the mortgage, and so barring the estate of other persons than the grantor, where there was no special contract to do so (*x*).

**989.** If a judgment debtor become tenant in possession, he may be ordered, in a suit to realize the charge, to give full effect to it by executing a disentailing deed (*y*).

(*u*) 3 & 4 Will. 4, c. 74, ss. 63, 64, 65, incorporated into the Bankruptcy Act, 1869, s. 25 (4).

(*x*) *Davis v. Tollemache*, 2 Jur., N. S. 1181.

(*y*) *Lewis v. Duncombe*, 20 Beav. 398.



**990.** Equity formerly gave no help to contracts for the transfer of ships, or any interests therein, where the contracts were not made in compliance with the statutes which regulated such transfers. But subject to the provisions of the Merchant Shipping Amendment Act, 1862, equities may now be enforced against owners and mortgagees of ships as in respect of any other personal estate (72).

**991.** Questions as to the rights of persons under defective conveyances may be settled in suits between mortgagors and mortgagees, in which the mortgagee has a right to bring before the court all who claim interests in the estate (z).

*Of the Effect of the Legal Estate, and the Tacking of Securities.*

**992.** The Vendor and Purchaser Act, 1874, c. 78, s. 7, provided that no priority or protection should be given or allowed to any estate, right or interest in *land* by reason of such estate, right or interest being protected by or tacked to any legal or other estate or interest in such land; although the person claiming such priority or protection should claim as a purchaser for valuable consideration and without notice. Provided that the section should not take away from any estate, right, title or interest, any priority or protection which but for the section would have been given or allowed thereto as against any estate or interest existing before the commencement of the act (a).

The enactment which made this important alteration in the law has however been repealed by the Land Transfer Act, 1875, as from the date at which it came into operation, except as to any thing duly done thereunder before the commencement of the act (b).

**993.** The influence of the legal estate not only gives priority to the security to which it is joined; but, by a doctrine

(z) *Evans v. Jones*, Kay, 29.

(a) 87 & 38 Vict. c. 78, s. 7.

(b) 38 & 39 Vict. c. 87, s. 129.

adopted by courts of equity, both in England and Ireland (*c*), a prior legal mortgagee, by annexing to his original security another which he holds for a subsequent debt, or an incumbrancer subsequent to the second, by getting in a prior legal security, may, under certain circumstances, postpone the rights of *mesne* incumbrancers, until satisfaction of both the securities which have been thus united.

This doctrine, called *tacking*, is applicable both to real and personal estate. It seems to be altogether contrary to any principle of equity, the essence of which is equality; and it is in fact only founded upon the preference which in this country is shown to legal titles. The principle (*d*) of it is that where there is a legal title and equity in one man, he shall not be hurt by reason of a mere prior equity in another; and its effect is merely to change the order of priority, and not to alter the mode of discharging the securities by combining the debts, and paying the interest on both in the first instance, instead of the interest and principal of each in succession (*e*).

994. We proceed to consider the qualifications necessary for the creditor who proposes to tack, and the circumstances under which he may do so; the nature of the debts which are subject to this right, and against what persons it may be enforced.

I. The right to tack, as well as the right of legal priority generally, (to which the following remarks as to the possession of the legal estate are also applicable,) depends in the first place upon the possession of, or dominion over, a prior legal interest, to which the inferior security may be joined.

A creditor cannot tack, if there be a prior legal mortgage, or a legal estate (*f*), or it seems a term of years, altogether

(*c*) *Tenison v. Sweeny*, 1 J. & L. 710; subject, however, to the effect of the Irish Registry Act (69, 1066).

(*d*) See *March v. Lee*, 1 Ch. Ca. 162; *Morret v. Paske*, 2 Atk. 52; *Wortley v. Birkhead*, 2 Ves. 571. *Belchier v. Renforth*, 5 Bro. C. C. 292; *Rooper*

*v. Harrison*, 2 Kay & J. 86.

(*e*) *Dunsany v. Latouche*, 1 Sch. & Lef. 163; *Montgomery v. Donohoe*, 5 Ir. Ch. R. 495; 6 id. 168.

(*f*) *Brace v. Duchess of Marlborough*, 2 P. Wms. 490.

outstanding (*g*), or attendant upon the inheritance (*h*); in which latter case the term will in equity follow all the estates subsisting upon the inheritance.

**995.** The possession of the legal estate may be effectual, whether it be obtained before, or at the time of the purchase (*i*); but possession of it even at the latter period is not necessary; it is of equal force in the hands of an incumbrancer who takes it upon advancing his money, or later, in pursuance of a contract at the time of the advance for a legal mortgage (*k*); and of one who, having at that time no notice of a prior incumbrance, afterwards gets in the legal estate as a protection for his own debt (*l*).

**996.** The possession of the entire legal estate is not necessary; a partial interest only, as a term of years, or a security which may be used at law, as a judgment, or statute, being sufficient (*m*). But an interest less than the whole legal estate will be postponed to one of earlier date. Thus a mortgage of the inheritance (*n*), subject to a term, will be postponed to a security fortified by that term; and a later judgment, or statute, will give no protection against the owner of an earlier one. So a term, created by a tenant for life, to secure an incumbrance on his life estate, will have priority over a later reversionary term limited by him out of the inheritance, though it be done by virtue of a power in the will under which he claims (*o*).

(*g*) *Knott, Exp.*, 11 Ves. 609, where the claim to tack was given up as against the *mesne* incumbrancer.

(*h*) *Charlton v. Low*, 3 P. Wms. 330, *i. e.*, supposing that it is not merged by the Satisfied Terms Act, 8 & 9 Vict. c. 112. But a term which was already attendant might before that act be clothed with a trust for a mortgagee or purchaser. (*Shaw v. Johnson*, 1 D. & S. 412; 7 Jur., N. S. 1005. See Sugd. R. P. S. 282, note, ed. 2. And see *Plant v. Taylor*, 7 H. & N. 211; 8 Jur., N. S. 140; *Owen v. Owen*,

3 H. & C. 88.)

(*i*) *Huntington v. Greenville*, 1 Vert. 49.

(*k*) *Cooke v. Wilton*, 7 Jur., N. S. 281; 29 Beav. 100.

(*l*) *Willoughby v. Willoughby*, 1 T. R. 763; *Barnett v. Weston*, 12 Ves. 130; *Sharpe v. Foy*, L. R., 4 Ch. 35.

(*m*) *Brace v. Duchess of Marlborough*, 2 P. Wms. 491; see *Russell Road Purchase-Monies*, Re, L. R., 12 Eq. 78.

(*n*) *Knott, Exp.*, 11 Ves. 609.

(*o*) *Hurst v. Hurst*, 16 Beav. 372.

**997.** But the acquisition of the legal estate in part of a security will not protect any more of the subsequent incumbrance than is charged upon that part (*p*). So that if part of an estate be mortgaged to A., then the whole to B., and then the whole to C., the latter, by getting in A.'s mortgage, shall not protect more of his own debt than was charged on the land mortgaged to A.

On the other hand, if two estates be mortgaged to A., then to B., and then one of them to C.; C. redeeming A., shall hold both estates against B., till payment of both securities, and is not confined after payment on the purchased security to that part of the estate comprised in his original mortgage (*q*). But this belongs more properly to a different principle of priority (**1033**).

**998.** Actual possession of the legal interest is not always necessary. An incumbrancer in whose favour a declaration of trust of the legal interest has been made (*r*), or who, having the best right to call for a transfer of that interest, has done some act short of obtaining a transfer, but equivalent to an act of ownership (*s*), shall have all the benefit that he would have gained by an actual transfer. This has indeed been expressly denied to be law, even where (*t*) the trustee of the legal estate covenants to hold it for the equitable mortgagee; on the ground, that if the latter has the best right, he ought to avail himself of it, and that if he neglect to possess himself of the legal estate, another may do so if he can. But the doctrine, that actual possession is not necessary, is stated by Lord St. Leonards, and appears in fact, to be the result of the other authorities. The custody of the deed creating the term, and a declaration (*u*) of trust in favour of the second incumbrancer, without notice of the prior mortgage, will give him an advantage over the first,

(*p*) *March v. Lee*, 1 Ch. Ca. 162.

(*q*) *Bovey v. Skipwith*, 1 Ch. Ca. 201.

(*r*) *Willoughby v. Willoughby*, 1 T. R. 763; *Stanhope v. Earl Verney*, 2 Eden, 81; Co. Litt., Butl., n., 290 b; *Wilkes v. Bodington*, 2 Vern. 599;

*Wilmot v. Pike*, 5 Hare, 22.

(*s*) *Pomfret v. Windsor*, 2 Ves. 486; *Maundrell v. Maundrell*, 10 Ves. 271; *Knott, Exp.*, 11 Ves. 618; Sugd. V. & P. 784, ed. 11.

(*t*) *Frere v. Moore*, 8 Price, 475.

(*u*) *Stanhope v. Earl Verney*, *supra*.

who has no express declaration, or has only a covenant to produce the deeds respecting the term; and it may be inferred from an observation made by Lord Eldon (*x*), that, where no declaration exists, the taking possession of the deed alone, or making the trustee a party to the instrument, are acts which will be sufficient to give the benefit of the legal estate (1031).

But an express declaration of ownership will not avail against a subsequent *bond fide* incumbrancer without notice who has obtained an actual assignment (*y*). Nor, it seems, will an incumbrancer, who, having the best right to call for, has not actually got in the legal interest, or done some equivalent act, and has no express declaration of trust in his favour, be allowed to derive any advantage from his bare right (*z*).

So, if the *puisné* incumbrancer having the legal estate, upon trust for the first mortgagee (and under circumstances which entitle him to hold it after discharge of the prior incumbrance, for the security of his own as against the *mesne* incumbrancer), part with the legal interest by selling the estate in execution of his trust, for the purpose of discharging the prior mortgage; the legal title being no longer interposed, the court falls back

(*x*) *Maundrell v. Maundrell*, 10 Ves. 271.

(*y*) *Stanhope v. Earl Verney*, *supra*.

(*z*) *Maundrell v. Maundrell*, 10 Ves. 271; *Knott, Exp.*, 11 Ves. 609. The meaning of Lord Eldon in the latter case is misrepresented by the reporter in the marginal note, at p. 618, and not clearly stated in the text; and the reporter appears to have misled Mr. Coote (*Mort.* 410). Lord Eldon is assumed to have laid down that the prior incumbrancer, if he has a better right to call for the legal estate, *is*, in equity, in the same state as if he had it. But this does not agree with his next observation, that before deciding that question in bankruptcy, he must be satisfied there was no danger of error; nor with his doctrine in *Maundrell v. Maundrell*, where he

plainly says that the term *must be got in in some sense*; and then goes on to say, what will be sufficient. It is submitted that the observation in *Knott, Exp.*, referred throughout to *the question*, what a court of equity was bound to hold, and should run thus:—"It must be considered with reference to the question, whether the first incumbrancer has a better right to call for an assignment of the legal estate, and *whether*, from that circumstance, a court of equity is bound to hold, not only that the first mortgage shall be protected as if it was the first equitable security, but that, having a better right to call for the assignment, he is in equity in the same state as if he had it." By this reading, the sentence will be quite consistent with the rest of the judgment.

upon the equitable principle of priority of date (1018), and deals accordingly with the surplus monies in the hands of the *puisné* incumbrancer (*a*).

999. In cases which are unaffected by the Satisfied Terms Act (*b*), it is not material, as regards the power of the legal estate to confer priority, that the debt, in respect of which the legal security was given, has already been satisfied, whether it were a mortgage of the fee (*c*), or for a term (*d*), or a judgment (*e*), or statute (*f*): it was even held that a legal advantage might be obtained by ill-practice or actual theft (*g*), but this certainly would not now be permitted (*h*). It was said in an old case (*i*), that the purchase of satisfied incumbrances might not be allowed where a person was designing a fraud; and where, by fraud, a prior incumbrance was procured to be vacated, the person aggrieved was put in the same plight as if it were in force (*k*).

(*a*) *Rooper v. Harrison*, 2 Kay & J. 86.

(*b*) 8 & 9 Vict. c. 112.

(*c*) *Hitchcock v. Sedgwick*, 2 Vern. 156; *Turner v. Richmond*, id. 81; *Holt v. Mill*, id. 279.

(*d*) *Willoughby v. Willoughby*, 1 T. R. 773; *Maundrell v. Maundrell*, 10 Ves. 270; *Evans v. Bicknell*, 6 Ves. 174, 185. Even against the Crown, if a term in gross were assigned before actual extent, it would not be liable; nor would a term, limited on a sale to the vendor to secure part of the purchase-money, be liable under an extent to the vendee, where before payment of the purchase-money he sold to a purchaser, who paid the debt, and had the term assigned to a trustee to attend the inheritance; for the term was never in the Crown debtor. (*Nicholls v. How*, 2 Vern. 389; *Fleetwood's case*, 8 Rep. 171 a; *King v. Lamb*, 13 Pr. 649.) But a term attendant on the inheritance would be bound by the extent, even in the hands of a *bona fide* purchaser without notice. (*Nicholls v. How*, *supra*.)

(*e*) *Edmunds v. Povey*, 1 Vern. 187.

(*f*) *Stanton v. Sadler*, 2 Vern. 30.

(*g*) *Sir John Fagg's case*, Eq. Ca. Abr. 354, pl. 1; 1 Ch. Ca. 68; *Burnel v. Ellis*; and *Harcourt v. Knowel*, cit. 2 Vern. 159.

(*h*) *Carter v. Carter*, 3 K. & J. 617; 4 Jur., N. S. 63.

(*i*) *Edmunds v. Povey*, *supra*.

(*k*) *Huntington v. Greenville*, 1 Vern. 49. "A man who comes in upon valuable consideration cannot strengthen his title by purchasing in the title of a stranger by fraud." (*Gill. Lex Præc.* 248.) "It sufficeth not in the law, ne yet in conscience as me seemeth, that a man hath right to that that he sueth for, but that also he sue by a just means, and that he hath both good right and also a good, and a true convenience to come to his right." (*Doct. & Stud.* 144.) So where a person whose property was pledged, and the money misappropriated by another, promised to pay a certain sum for redeeming it; and afterwards by a trick repossessed himself of the property; he was not allowed to hold it

**1000.** A conveyance of the legal estate by the mortgagor will, however, give priority to the assignee for value, though it was fraudulent in the mortgagor to assign it, or though it was obtained from him by fraud, provided the assignee had no notice of the fraud (*l*); the protection has been extended to a person in possession under a false title depending upon a forged will, but without notice of the forgery (*m*); and the same rule enables a mortgagee to tack a further advance made without notice to a person in possession of the mortgaged estate, and falsely claiming to be owner of the equity of redemption (*n*).

**1001.** A purchaser without notice who has the legal estate is protected, though he who conveyed it to him was affected by notice (**1022**). And vice versâ, if an incumbrancer without notice assign to one who has notice, the assignee, provided he be a transferee of the very same interest which was held by the person under whom he claims (*o*), may protect himself; and the reason given by Lord Hardwicke is, that it is to prevent the stagnation of property (*p*). Therefore, if a third mortgagee advance his money upon a transfer of the first mortgage, without notice of the second, he shall have priority over the second, though the latter upon taking his security gave notice to the first (*q*). The rule holds, although the conveying party has notice of an actual trust, where he is an unsatisfied mortgagee, who lent his own money without notice of the trust; so that where one, who had covenanted to convey upon trust, made three successive mortgages without notice; the first mortgagee, who had priority by virtue of the legal estate, was able, by conveying to the third mortgagee, to give him preference before the trust (*r*).

against the pledgee without payment.  
(*Mocatta v. Murgatroyd*, 24 Beav. 585.)

(*l*) *Lloyd v. Attwood*, 3 De G. & J. 614; 5 Jur., N. S. 1323.

(*m*) *Jones v. Powles*, 3 M. & K. 581. See *Robinson v. Briggs*, 1 Sm. & G. 188.

(*n*) *Young v. Young*, L. R., 3 Eq. 801.

(*o*) *Brandling v. Ord*, 1 Atk. 571.

(*p*) *Mertins v. Jolliffe*, Ambl. 313; *Sweet v. Southcote*, 2 Bro. C. C. 66; *Lowther v. Carlton*, 2 Atk. 139; *Ferrars v. Cherry*, 2 Vern. 383; *McQueen v. Farquhar*, 11 Ves. 467; see 4 De G., M. & G. 503. See *Harrison v. Forth*, Pre. Ch. 51.

(*q*) *Peacock v. Burt*, Coote, Mort. 569; 4 L. J., N. S., Ch. 33.

(*r*) *Bates v. Johnson*, Joh. 304; 5 Jur., N. S. 842. See *Spencer v. Pear-*

**1002.** A purchaser for valuable consideration is protected by a legal right, obtained without notice and on the occasion of his purchase ; though the conveyance was made by a trustee in fraud of his trust (*s*). But not if he had notice, though the notice were only constructive (*t*).

And inasmuch as he who takes an assignment from a trustee with notice of the trust, becomes himself a trustee (*u*), a subsequent equitable incumbrancer without original notice, will not be allowed any benefit by getting in a legal estate from a mortgagor, whom (actually or constructively) he knows to be a trustee, holding the legal estate for the protection of a prior equitable mortgagee (*v*). So the holder of debentures upon the property of a corporation, under an act of parliament which placed all debenture holders on an equal footing, was not allowed to gain priority in respect of a debenture debt by means of a mortgage on other property of the corporation (*x*).

And in the converse case where the trustee knows that he is a trustee, but the equitable incumbrancer does not, the former can give no advantage against his cestui que trust by assigning a legal interest without receiving value (*y*).

Where the mortgagee acquired the legal estate by a conveyance, executed under a mistake as to the ownership of the property, it was held that he should have no benefit against trusts disclosed on the face of the instrument which constituted his title to the legal estate (*z*).

son, 24 Beav. 266. But in a suit for specific performance, such a title depending upon the want of notice of the vendor under such circumstances, will not be forced on the purchaser (Freer v. Hesse, 4 De G., M. & G. 503.)

(*s*) Pilcher v. Rawlins, L. R., 7 Ch. 259.

(*t*) Maxfield v. Burton, L. R., 17 Eq. 15.

(*u*) Saunders v. Dehew, 2 Vern. 271; Mumford v. Stohwasser, L. R., 18 Eq. 556.

(*v*) Allen v. Knight, 5 Hare, 272. See Willoughby v. Willoughby, 1 T. R. 773; and see Blennerhasset v. Day, 2

Ba. & Be. 133; Sharples v. Adams, 32 Beav. 213; but see observations of Sir G. Jessel, M. R., in Maxfield v. Burton, supra.

(*x*) De Winton v. Mayor of Brecon, 26 Beav. 533.

(*y*) Mumford v. Stohwasser, L. R., 18 Eq. 556, per Sir G. Jessel, M. R.

(*z*) Carter v. Carter, 3 K. & J. 617; 4 Jur., N. S. 63; not approved of by James and Mellish, L. JJ., in Pilcher v. Rawlins, L. R., 7 Ch. 259. See observations in Frosser v. Rice, to the effect that the getting in of a legal interest from a bare trustee, gives no advantage. (28 Beav. 74.)



**1003. II.** It is essential to the right to tack, that the debt was either originally contracted on the credit of the estate, or, if at first it were a simple contract debt, or only a lien upon the mortgaged property, that a specific security were taken for it before the title of the subsequent incumbrancers accrued (*a*).

The whole doctrine of tacking being a great severity upon the *mesne* incumbrancer, who may have lent his money on a sufficient security, and is yet liable to be defeated by a matter *inter alios acta*, this rule is strictly followed (*b*).

The consequences of it are, that a legal mortgagee may tack a further charge (*c*), or a subsequent judgment, or statute debt (*d*), to his mortgage against a *mesne* incumbrancer. And an equitable mortgagee may protect his security by getting in a prior legal incumbrance (*e*). But it seems, that in the present state of the law, the purchase of a prior judgment will not help him.

Where a statute, recognizance or judgment is taken in by a mortgagee to defend a subsequent incumbrance, the purchaser will not be further or longer protected by it than till he has received so much as will satisfy that security (*f*). Now, the account at law on a judgment was for no more than the extended, which was always much below the real, value of the estate (*g*); in equity the account was of the amount really received; but, if the judgment were in the possession of a mortgagee, he was compelled to account only according to the extended value, unless he had received enough to satisfy his mortgage also (*h*). The possession, therefore, of the judgment gave him the advantage of accounting upon the extended value only; but the judgment creditor being now subject to

(*a*) *Brace v. Duchess of Marlborough*, 2 P. W. 491; *Knott, Exp.*, 11 Ves. 609; *Lacey v. Ingle*, 2 Ph. 413.

(*b*) *Brace v. Duchess of Marlborough*, *supra*.

(*c*) *Bedford v. Backhouse, Kelynge*, 5; *Williams v. Owen*, 13 Sim. 597; *Lloyd v. Attwood*, 3 De G. & J. 614; 5 Jur., N. S. 1323.

(*d*) *Shepherd v. Titley*, 2 Atk. 348;

*Jackson v. Langford (Anon.)*, 2 Ves. 662; *Brace v. Duchess of Marlborough*, *supra*.

(*e*) *Goddard v. Complin*, 1 Ch. Ca. 119.

(*f*) 1 Vern. 52.

(*g*) 2 Ves. 590.

(*h*) 3 Atk. 517; *Pow. Mort.* 518, 519.

such account (*i*) in the court out of which the execution is sued, as a tenant by *elegit* is subject to in equity, it is observed, by Mr. Coote (*h*), that under the new law a subsequent incumbrancer will no longer gain this advantage by buying in a prior judgment debt.

On the other hand, a creditor by statute or judgment before the statute 1 & 2 Vict. c. 110, could not tack by getting in a legal security (*l*); for he did not trust to the credit of the land, nor could he, like a subsequent mortgagee, be deceived by the mortgagor's concealment of a prior incumbrance.

1004. There have, however, been decisions, which, if they be of sufficient authority, establish an exception to each branch of the above rule. It was held (*m*), that a mortgagee might not tack a subsequent judgment against a *mesne* mortgagee, or assignee of the equity of redemption, if he had bought in without the consent of the mortgagor; because this, it was said, was only to load the estate where the mortgagee had no prospect of bettering his own security. The decision appears to be of doubtful authority. The judgment was equally a burthen upon the estate, whether it were a security for money advanced by the prior mortgagee or by a third person. If the debt had been originally the third mortgagee's, he might have tacked it against the *mesne* incumbrancer. Why not, then, when it was purchased? The mortgagor had a right to charge the equity of redemption. Why should the *mesne* incumbrancer be in a better position by means of an indirect charge to A., through the medium of B., than by a direct judgment to A.?

In the other case referred to (*n*), the prior incumbrancer had first a judgment debt and then a mortgage, but between his two securities there was another judgment debt. Under the strict terms of the rule, the prior incumbrancer could not have tacked, because he did not originally advance his money

(*i*) 1 & 2 Vict. c. 110, s. 11.

(*h*) Coote, Mort. 406, ed. 3.

(*l*) Brace v. Duchess of Marlborough,  
2 P. W. 491; Breerton v. Jones, 1 Eq.  
Ca. Abr. 325; Knott, Exp., 11 Ves.

609.

(*m*) Breerton v. Jones, 1 Eq. Ca.  
Abr. 325.

(*n*) Smithson v. Thompson, 1 Atk.  
520.

on the credit of the estate; he had a mere lien. But it was held, that if he had no notice of the second judgment when he took his mortgage, the *mesne* judgment creditor should not have a sale without paying off both the mortgagee's securities, principal and interest; for otherwise a mortgagee would be in a worse position, with a prior incumbrance in his favour, than a mortgagee without notice of a prior judgment. And the case was distinguished from the purchase by a subsequent judgment creditor (*o*) of a prior mortgage.

**1005.** Under the present law, it seems possible that tacking may be effected by a creditor who has originally lent his money on the security of a judgment, without resorting to the principle of the decision in *Smithson v. Thompson*, and yet in conformity with the rule under consideration.

The sole<sup>d</sup> reason why the judgment creditor could not tack before the statute 1 & 2 Vict. c. 110, seems to be, that he had not lent his money on the credit of the estate. He had no specific lien (*p*). Now the act in question expressly gives (*q*) the judgment creditor the same remedies in equity, against the hereditaments charged by virtue of the act, as he would be entitled to in case the person against whom judgment is entered up had power to charge, and had by writing agreed to charge, the same hereditaments with the judgment debt and interest. A judgment creditor is therefore now a person having a charge on the estate, as if by contract, instead of, as heretofore, by force of a proceeding *in invitum*; from the time of the return to the writ of execution (*r*) (156) he has a specific charge upon the estate, and the character of an equitable mortgagee (*s*). If, therefore, before the act that equity only was wanting which would arise from having trusted to the credit of the estate, the act seems to have supplied this defect. It is not material whether the judgment creditor at first lent

(*o*) *Churchill v. Grove*, 1 Ch. Ca. 35, 36.

(*p*) *Brace v. Duchess of Marlborough*, 2 P. W. 491; *Jackson v. Langford* (Anon.), 2 Ves. 662.

(*q*) Sect. 13.

(*r*) *Guest v. Cowbridge Railway Co.*, L. R., 6 Eq. 619.

(*s*) Per Turner, L. J., 17 Jur. 981.

his money on the judgment, or took it to secure an existing debt; for a simple contract bond or judgment creditor, who takes a mortgage to secure his original debt, being entitled to tack, as much as a mortgage creditor, from the beginning (*t*), it seems to follow, that if a judgment creditor may tack as above suggested, it will make no difference how the judgment was taken.

But this principle would not, it seems, apply as well to the subsequent, as to the prior judgment creditor; for the former takes by his judgment only what the debtor has to give him, that is, he takes subject to prior equities (1083).

It may, however, be considered, that the doctrine of tacking is not to be extended, on the strength of an accident of legislation.

The rule in question has been held to enable the holder of notes, expressed as receipts for a sum of money from the creditor, "to be secured by mortgage upon my S. estate," to protect his debt by the purchase of a prior legal mortgage (*u*). Where, however, there was a legal mortgage of leaseholds (*x*), the mortgagee was not allowed to tack to that security subsequent advances made on the strength of a parol engagement that they should be so tacked. This last case was not decided upon the rules of tacking in the view which we are now taking of them, but upon the question as to the right to make an equitable mortgage, by deposit, a security for subsequent advances. The argument was, that the mortgagee, having a legal assignment, held under a contract for conveyance, and not a contract for deposit, and the doctrine of equitable mortgages was not to be extended to such a case. The case of *Matthews v. Cartwright* of course assumed, that the notes or receipts, if they did not amount to an equitable charge upon the estate, were at least evidence of an actual loan on the security of the land.

The operation of this rule prevents a person who has lent the mortgagor money on the security of a contract for sale of the estate, that is, on the security of the *purchase-money*,

(*t*) *Knott, Exp.*, 11 Ves. 609.

347.

(*u*) *Matthews v. Cartwright*, 2 Atk.

(*x*) *Hooper, Exp.*, 1 Mer. 7.

from protecting his advance by getting in a prior legal mortgage (*y*).

1006. III. The person who claims a right to tack must hold both securities in the same right.

Therefore, if a prior mortgagee take an assignment of a subsequent mortgage, as trustee for another (*z*), or become possessed as executor (*a*) of a *puisné* mortgage of leaseholds, he cannot tack to the prejudice of *mesne* incumbrancers; for though the estates be in one person, he holds them in different rights, and as if they were in different persons. But he may tack under a deed which secures a debt of his own, though it also contains trusts for others (*b*).

There are earlier cases, in which creditors, holding one of the securities as personal representatives, have been allowed to tack. As where a woman executrix (*c*), and sole legatee of the mortgagee, married, and then lent money to the mortgagor on bond. And where a woman being a bond creditor, married the mortgagee and died, and he took out administration to her, and was allowed to tack (*d*). But it will be observed in both these cases, that it was only the legal title which was gained by representation, the executrix and administrator being otherwise beneficially entitled to the property: whereas this rule, it is conceived, applies only when the person claiming to tack has nothing more than a legal title by representation, or as a trustee to one of the debts.

1007. IV. The prior mortgagee, when he acquires the subsequent security (*e*), and the *puisné* incumbrancer, when he originally lends his money (*f*), must be without notice of

(*y*) Lacey *v.* Ingle, 2 Phil. 413.

(*z*) Morret *v.* Paske, 2 Atk. 52; and see Shaw *v.* Neale, 6 H. L. C. 581; 4 Jur., N. S. 695.

(*a*) Barnett *v.* Weston, 12 Ves. 130; and see Lewes *v.* Morgan, 5 Price, 155.

(*b*) Spencer *v.* Pearson, 24 Beav. 266.

(*c*) Price *v.* Fastnedge, Ambl. 685.

(*d*) Blackwell *v.* Symes, cited *id.* Note, that the tacking in these cases

was against the heir of the mortgagor, and therefore not in conflict with Rule VII. (1014.)

(*e*) Morret *v.* Paske, 2 Atk. 52; Willoughby *v.* Willoughby, 1 T. R. 763; Bedford *v.* Backhouse, Eq. Ca. Abr. 615. *Shepherd & Tiley 2.*

(*f*) ~~Shepherd *v.* Titley, 2 Atk. 348;~~ Willoughby *v.* Willoughby, *supra*; Rose *v.* Watson, 10 H. L. C. 672; 10 Jur., N. S. 297. *Brown & Co*

the incumbrance, which, by virtue of the legal estate, he claims to postpone.

Therefore, if a third mortgagee have advanced money (*h*), with notice of the second, and have afterwards bought in the first, he cannot hold as against the second after the first has been paid (608). Because notice makes him come fraudulently, so that he has no longer equal equity (which must coincide with possession of the legal estate) with the other incumbrancer; and besides, as has been observed (*i*), the act of lending with notice amounts to an acknowledgment, that the lender will take subject to him of whose claim he has notice.

And a mortgagee, who has lent with notice of a prior incumbrance, shall not, by getting in an old outstanding term, be satisfied against others of which he had not notice; because he had not the best right to call for the legal estate (*k*). If he conceal his notice, as by taking a covenant that the estate is free from incumbrances, except the term, this being against conscience, will be a further reason against preferring him.

So far as this rule applies to the *puisé* incumbrancer, it will be observed to imply, that notice of the *mesne* charge at the time of taking in the prior one, is no objection; that being, to use the words of Lord Hardwicke (*l*), the very occasion that shows the necessity of taking it in. And he may even take it in after bill filed by the *mesne* incumbrancer (*m*).

**1008.** Although it is a general rule, that if the first mortgagee lend a further sum without notice of a second mortgage, his whole money shall be paid in the first place (*n*), a mortgagee who has forgiven part of the debt, and has afterwards lent a further sum of like amount, at the time of lending which he had notice of an intermediate mortgage, cannot tack his further advance as a revival of the debt which was

(*h*) Hiles v. Moore, 15 Beav. 181.

(*i*) Pow. Mort. 453, n. (*x*).

(*k*) Willoughby v. Willoughby, *supra*;  
and see the case before Lord Cowper,  
cited 10 Ves. 270.

(*l*) Wortley v. Birkhead, 2 Ves. 573;

Edmunds v. Povey, 1 Vern. 187.

(*m*) Rooper v. Harrison, 2 Kay & J.  
86.

(*n*) Bedford v. Backhouse, Eq. Ca.  
Abr. 615; Calisher v. Forbes, L. R.,  
7 Ch. 109.

forgiven (*o*); and parol evidence is not admissible in such a case of the intention to revive the old debt.

**1009.** It was for many years held that where the original mortgage was expressly made a security for further advances, and a second mortgagee lent his money with notice of this provision (*p*), the first mortgagee might tack his further advances made subsequently to the second mortgage, though he had notice of that security; because it was the folly of the second mortgagee, with notice, to take such a security. The decision appears to have been incorrectly reported; and was doubted by Mr. Coventry (*q*), and afterwards by Lord St. Leonards (*r*).

It was also urged in the present work, that the doctrine amounted to a perpetual curb on the mortgagor's right to incumber the equity of redemption: that it is contrary to the general principles of equity that a mortgagee should, by thus taking a security for advances which may never be made, put a pressure on the mortgagor, by taking away his power of raising money from other persons: the first mortgagee being never bound by such a clause to make further advances at the mortgagor's pleasure. And that, after notice of a *mesne* incumbrance, he should do so at his own risk (*s*). For which, with some other reasons, the doctrine alleged to have been established in the case of *Gordon v. Graham* was overruled (*t*). And the rule, that in such a case the further advances of the first will be postponed to the debt of the second incumbrancer, will not be affected by an alleged trade custom operating for the benefit of the first incumbrancer only (*u*).

The doctrine of notice does not generally affect a *puisné* incumbrancer, whose security avoids the earlier deed; as

(*o*) *Shepherd v. Titley*, 2 Atk. 350.

(*p*) *Gordon v. Graham*, 7 Vin. Abr. 52, pl. 3, E. 3.

(*q*) *Pow. Mort.* 534, note (*e*).

(*r*) 2 Dru. & War. 431; 6 H. L. C. 597.

(*s*) 1st ed. p. 363.

(*t*) *Hopkinson v. Rolt*, 9 H. L. C. 514, affirming the decision of M. R.

in *Rolt v. Hopkinson*, 25 Beav. 461;

3 De G. & J. 177; 4 Jur., N. S. 919.

As to the application of the principle to the case of a continuing guarantee, see *Burgess v. Eve*, L. R., 13 Eq. 450.

(*u*) *Dann v. City of London Brewery Co.*, L. R., 8 Eq. 155; *Menzies v. Lightfoot*, id., 11 Eq. 459.

where the subsequent incumbrancer takes with notice of a prior voluntary settlement (*x*).

1010. As to the time of acquiring the debt proposed to be tacked.

V. A prior mortgagee cannot tack a subsequent debt taken in *pendente lite* (*y*), the suit (it is presumed) being duly registered (961); but a *puisné* incumbrancer may tack a prior security so taken in, provided it be taken in before a decree has been made to account (*z*); for after that he can do nothing to change the order of payment (*a*).

This restriction on the prior mortgagee depends upon the rule last considered: because the suit, if registered, is notice to him of the *mesne* incumbrance. As to the *puisné* incumbrancer, whose right to get in the earlier security has been held (*b*) not to be prejudiced by the prior submission of the first mortgagee, by his answer in the suit, to assign his security to the plaintiff on payment of his debt, we have seen that the rule as to notice is different; and the reason why he may tack *pendente lite*, up to the time of decree, is, that up to that time the change of the priorities, will not vary any right which might not have been varied before the commencement of the suit; and a subsequent incumbrancer may have no knowledge of, and, consequently, may be unable to protect himself against the *mesne* charge until the suit is already pending. And as the honesty of his debt is not affected by the discovery, so his right of protecting it, and the efficacy of the protection, are not prejudiced.

But the inquiry into the priorities deals with them as they stand at the date of the decree (*c*), at which, and not at any subsequent time, they are considered as fixed. If it were not

(*x*) *Gardiner v. Painter*, Sel. Ca. in Ch. (Macnaghten), 182.

(*y*) *Morret v. Paske*, 2 Atk. 53.

(*z*) *Brace v. Duchess of Marlborough*, 2 P. W. 490; *Hawkins v. Taylor*, 2 Vern. 29; *Robinson v. Davison*, 1 Bro. C. C. 63; *Peacock v. Burt*, 4 L. J., N. S., Ch. 33; *Coote*, Mort. 569; *Bel-*

*chier v. Butler*, 1 Eden, 522; *Bates v. Johnson*, 5 Jur., N. S. 842; *Joh. 304*.

(*a*) *Bristol v. Hungerford*, 2 Vern. 525; *Wortley v. Birkhead*, 2 Ves. 574; 3 Atk. 811; *Knott, Exp.*, 11 Ves. 619.

(*b*) *Belchier v. Butler*, 1 Eden, 522.

(*c*) *Wortley v. Birkhead*, 2 Ves. 574.



so, an incumbrancer who had obtained a decree for redemption, might be shut out by a prior incumbrancer, who, after decree, had conveyed to another subsequent to them both. A bankruptcy has not the effect of a decree so as to prevent subsequent changes of priority (*d*).

**1011.** VI. Debts which form a lien on the estate, as debts by mortgage, further charge, or judgment (*e*) (155), may be tacked (*f*) against the mortgagor (*g*), his sureties (*h*), and all others claiming under him, including *mesne* incumbrancers; and the reason given is, that the person who took the security, trusted to the hold which he already had on the land.

**1012.** With respect to the surety, the right to tack a further advance against him, when he pays off the mortgage, will depend upon the right of the mortgagee to make the further advance. If this right be not affected by the agreement with the surety the right of the latter will be subject to the mortgagor's power over the equity of redemption, and the further advance may be tacked against him (*i*). So if the mortgagee's right to make a further advance be affected by notice of the *mesne* incumbrance, which, preventing him from tacking against that charge will also bar him from denying the surety's right to the benefit of the security on payment of the first advance alone (*k*) (1043).

**1013.** A judgment duly registered after execution has been issued and a return made by the sheriff (155) may be tacked

(*d*) Knott, Exp., 11 Ves. 619.

(*e*) Or monies paid in respect of purchase, and for improvements. (*Hipkins v. Amery*, 2 Gif. 292; 6 Jur., N. S. 1047.)

(*f*) *Brace v. Duchess of Marlborough*, 2 P. W. 494; *Barnett v. Weston*, 12 Ves. 130; *Williams v. Owen*, 13 Sim. 597; *Jackson v. Langford*, 2 Ves. 662; *Baker v. Harris*, 16 Ves. 397; *Shepherd v. Titley*, 2 Atk. 348; *Knott*, Exp., 11 Ves. 609; *Cox*, Exp., 2 M.,

D. & De G. 486.

(*g*) *Jackson v. Langford*, 2 Ves. 662. Otherwise if the holder of the security be a trustee to sell and pay the surplus to the mortgagor. (*Petit*, Exp., 1 Gl. & J. 47.)

(*h*) *Williams v. Owen*, 13 Sim. 597.

(*i*) *Williams v. Owen*, supra; *Farebrother v. Wodehouse*, 23 Beav. 18; 2 Jur., N. S. 1181.

(*k*) *Drew v. Lockett*, 32 Beav. 499; 9 Jur., N. S. 786.

notwithstanding the bankruptcy of the judgment debtor, provided the execution was prior to the date of the order of adjudication and without notice of an act of bankruptcy (*l*).

**1014. VII.** But the debts, which are not a lien upon the mortgaged property, may not be tacked either against the mortgagor himself, or any person claiming under him, except those who have become liable in respect of their possession of the mortgaged property to the payment of such debts; and even against them it cannot be done to the prejudice of *mesne* incumbrancers.

Therefore neither against the mortgagor (*m*) himself, his creditors (*n*), assignees for valuable consideration (*o*), or his devisees in trust for payment of debts (*p*), or persons entitled to the benefit of a charge (*q*) for payment of his debts, or the assignee (*r*) of his heir, executor or beneficial devisee (none of whom are liable by possession of the estate to the payment of the mortgagor's simple contract debts, or bond or other specialty debts, not being a lien on the estate), will there be (*s*) any right to tack such debts. This rule prevents a surety from tacking against the *puisné* mortgagee the costs of defending an action by the mortgagee whose debt the surety has discharged, such costs being only a simple contract debt (*t*).

(*l*) *Baker v. Harris*, 16 Ves. 397; *Boyle, Exp.*, 17 Jur. 979; 3 De G., Mac. & G. 515; Bankruptcy Act, 1869, ss. 12, 40.

(*m*) *Challis v. Casborn*, Pre. Ch. 407; see 2 Hare, 339; *Archer v. Snatt*, 2 Str. 1107; *Elvy v. Norwood*, 5 De G. & S. 243. *Demainbray v. Metcalfe*, 2 Vern. 690, seems contra, and even goes to the extent that a derivative pawnee of chattels personal may hold the pledge as against the original pledgor until payment, not only of the amount due to the derivative pawnee, but also of monies lent by him to the original pawnee on notes of hand. But the decision is queried by the reporter, and seems to be of no authority.

(*n*) *Heams v. Bance*, 3 Atk. 630; *Adams v. Claxton*, 6 Ves. 225; *Cole-*

*man v. Winch*, 1 P. Wms. 775; *Hamer-ton v. Rogers*, 1 Ves. jun. 513.

(*o*) *Troughton v. Troughton*, 1 Ves. 86; *Jackson v. Langford*, 2 Ves. 662; *Adams v. Claxton*, supra.

(*p*) *Heams v. Bance*, 3 Atk. 630; *Irby v. Irby*, 22 Beav. 217.

(*q*) *Price v. Fastnédge*, Amb1. 685.

(*r*) *Coleman v. Winch*, supra; *Vanderzee v. Willis*, 3 Bro. C. C. 23; *Bayly v. Robson*, 2 Eq. Ca. Abr. 594; Pre. Ch. 89.

(*s*) Notwithstanding *Baxter v. Manning*, 1 Vern. 244; *Halliley v. Kirtland*, 2 Rep. in Ch. 162; and other early cases, in which bond debts were allowed to be tacked against the mortgagor.

(*t*) *South v. Bloxam*, 11 Jur., N. S. 319; 2 Hem. & Mil. 457; 34 L. J., Ch. 369.

Against the heir (*u*) and beneficial devisee (*x*), however, who are liable in respect of their possession of the mortgaged real estate, descending upon or devised to them, to discharge the bond and other specialty debts of the mortgagor, such debts may be tacked; and the personal representative of the mortgagor, being in like manner liable in respect of his possession of the mortgagor's chattels to his bond and other specialty (*y*) and simple contract (*z*) debts, such debts may be tacked against him, to securities on the testator's chattels. And this is confessedly (*a*) not founded upon any principle of equity, but is merely to avoid circuity of action, that the creditor may not be driven to enforce, by separate proceedings, claims to which the operation of law or the act of the mortgagor have rendered the same person liable (1586).

But the tacking of debts on the principle of avoiding circuity is not permitted to be done to the injury of *mesne* incumbrancers, against whom the creditor has no equity. There is, therefore, no tacking as against them in such cases, whether they claim by mortgage, judgment or statute (*b*).

**1015.** This right to tack the specialty debt of the mortgagor, against the heir or beneficial devisee, enables the mortgagee, or those who claim under him in a redemption or foreclosure suit, to tack the arrears of interest on the mortgage, either where the interest is secured by a collateral bond (*c*) or under the ordinary covenant (binding the heirs) for

(*u*) *Margrave v. Le Hooke*, 2 Vern. 207; *Morret v. Paske*, 2 Atk. 53; *Jackson v. Langford*, 2 Ves. 662; *Jones v. Smith*, 2 Ves. jun. 372; *Elvy v. Norwood*, 16 Jur. 493; 5 De G. & S. 240.

(*x*) *Heams v. Bance*, 3 Atk. 630; *Coleman v. Winch*, 1 P. Wms. 775; see *Du Vigier v. Lee*, 2 Hare, 340.

(*y*) *Anon.*, 2 Vern. 176.

(*z*) *Coleman v. Winch*, 1 P. Wms. 775; 2 Dru. & War. 190; *Eccles v. Thawill*, Pre. Ch. 18; *Rolfe v. Chester*, 20 Beav. 610; see *Spalding v. Thomp-*

*son*, 26 Beav. 637; *Haselfoot's Estate*, Re, L. R., 13 Eq. 327.

(*a*) *Lowthian v. Hasel*, 3 Bro. C. C. 162; *Jones v. Smith*, 2 Ves. jun. 372; *Heams v. Bance*, 3 Atk. 630; *Morret v. Paske*, *supra*.

(*b*) *Morret v. Paske*, 2 Atk. 52; *Powis v. Corbet*, 3 Atk. 556; *Anon.*, 2 Ves. 662; *Lowthian v. Hasel*, 3 Bro. C. C. 162,

(*c*) *Du Vigier v. Lee*, 2 Hare, 326; see *Hunter v. Nockolds*, 1 Mac. & G. 640, 650; 1 H. & Tw. 644.

payment of it in the mortgage deed (*d*); by which means the mortgagee may obtain payment of arrears of interest beyond the six years limited by 3 & 4 Will. 4, c. 27, s. 42, without resorting to an action on the specialty (*e*), under 3 & 4 Will. 4, c. 42, s. 3. And this, it seems, may be done, though no case for tacking be made on the pleadings (*f*).

**1016.** Where real estate was the subject of the mortgage, the simple contract debts of the mortgagor could not formerly be tacked against the heir or beneficial devisee of the mortgagor. But real estate having been made, by 3 & 4 Will. 4, c. 104, assets in the hands of the heir or devisee of the debtor, for the payment as well of simple contract as of specialty debts, the mortgagee may now tack subsequent simple contract debts against those persons by reason of their liability in respect of their possession of the estate to pay such debts; but not against specialty creditors (*g*), prior to the passing of 32 & 33 Vict. c. 46, by which in the administration of the estates of deceased persons specialty and simple contract creditors are treated as standing in equal degree; and it is considered that the act has not enlarged the right of tacking (*h*).

**1017.** The following is a concise view of the practical effect of the rules which we have been considering.

A prior legal mortgagee (*i*) being without notice of a *mesne* incumbrance (*k*), and having acquired at any time before a *lis pendens* affecting the securities and duly registered (*l*), a subsequent charge on the estate, unless, it seems (but query) such subsequent charge being a lien only, and not for a debt advanced on the credit of the property, were purchased by the prior mortgagee without the consent of the mortgagor (*m*).

(*d*) *Elvy v. Norwood*, 16 Jur. 493, and 5 De G. & S. 240.

(*e*) *Hunter v. Nockolds*, *supra*.

(*f*) *Elvy v. Norwood*, *supra*.

(*g*) *Rolfe v. Chester*, 20 Beav. 610; *Thomas v. Thomas*, 22 Beav. 341.

(*h*) As to the mode of construing

the act, see *Williams' Estate*, Re, L. R., 15 Eq. 270.

(*i*) Rule I. (994.)

(*k*) Rule IV. (1007.)

(*l*) Rule V. (1010.)

(*m*) (1004.)

Or a *puisné* mortgagee or person who has lent his money on the credit of the property, including, perhaps, a prior judgment creditor under the new law (*n*), and under the old law a prior judgment creditor with a subsequent mortgage (*o*), and who, by purchase or otherwise, has obtained a prior legal interest (*p*) at any time before a decree to account in a suit affecting the priorities of incumbrancers on the estate (*q*), and without having had notice (*r*) of prior incumbrances at the time of lending on his original security:

And (whether the legal interest were originally or subsequently acquired) holding both securities in the same right (*s*)—may tack—

Debts by mortgage, further charge, judgment ( <i>t</i> ), or statute (all these being a lien on the estate ( <i>u</i> )),	} against {	The mortgagor, and all who claim under him, including <i>mesne</i> incumbrancers ( <i>u</i> ).
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Bond and other specialty debts of the mortgagor, in the case of a mortgage of realty, whether freehold or copyhold ( <i>x</i> ), and also by virtue of 3 & 4 Will. 4, c. 104, his simple contract debts ( <i>y</i> ),	} against {	The heir and beneficial devisee of the mortgagor, where there are no <i>mesne</i> incumbrancers ( <i>z</i> ).
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Bond and other specialty and simple contract debts of the mortgagor in a mortgage of personalty ( <i>z</i> ),	} against {	The personal representative of the mortgagor, where there are no <i>mesne</i> incumbrancers ( <i>z</i> ).
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But they may not tack—

The simple contract bond or other specialty debts of the mortgagor (being no lien on the estate ( <i>z</i> )),	} against {	The mortgagor, his creditors, assignees for valuable consideration, devisees in trust or persons entitled to a charge for payment of his debts, or the assignee of his heir, executor or beneficial devisee ( <i>z</i> ).
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(*n*) Rule II. (1003.)

(*o*) (1004.)

(*p*) Rule I. (994.)

(*q*) Rule V. (1010.)

(*r*) Rule IV. (1007.)

(*s*) Rule III. (1006.)

(*t*) But see Rule II. (1003.)

(*u*) Rule VI. (1011.)

(*x*) Rule VII. (1014.)

(*y*) (1016.)

(*z*) Rule VII. (1014.)



## CHAPTER VII. PART 2.—OF EQUITABLE PRIORITY.

1018. *Of the General Rules of Equitable Priority.*1033. *Of the Right to consolidate several Securities.*

1018. The equitable, like the legal mortgagee, is entitled, as against the mortgagor and all claiming under him, who have not or for any reason are not allowed to retain the full benefit of the legal estate, to add to his original debt subsequent advances or liabilities made or incurred upon the security or credit of the estate, without notice of any *mesne* charge (a) (1008). But when there are several incumbrancers whose equities are not disturbed by notice or otherwise, their rights generally take effect in order of date, according to the maxim *Qui prior est tempore potior est jure* (b).

1019. A notable exception to this general rule is, however, made in favour of advances, by means of which the whole of the incumbered property is saved from loss or destruction; and which, upon a plain principle of equity, are payable in priority to all other charges of earlier date, and among themselves have precedence according to the inverse order of their respective dates. The most familiar application of this principle is in cases of bottomry, for the validity of which kind of security it is necessary that the advance should be made for the preservation or salvage of the ship, or the prosecution of the voyage (117, 1060).

The same principle is applied in other cases to secure the repayment of money advanced for the preservation of incumbered property from ruin or forfeiture (208), and it entitles a solicitor, who brings a cause to conclusion, to priority for his costs, over one who previously conducted, but for want of means

(a) *Wormald v. Maitland*, 35 L. J., Ch. 69 (questioned as to the effect of constructive notice, *Agra Bank v. Barry*, L. R., 7 H. L. 135); *Calisher v. Forbes*, L. R., 7 Ch. 109. See St.

*John v. Holford*, 1 Ch. Ca. 97, relating to the liabilities of a surety.

(b) *Bristol v. Hungerford*, 2 Vern. 525; *Beckett v. Cordley*, 1 Bro. C. C. 353; *Rice v. Rice*, 2 Drew. 73.

or for other reasons has abandoned it: and it seems also over the costs of a former solicitor who has been discharged (*c*) (224). The principle is also adopted in cases of payment of head rent, in order to prevent eviction by a superior landlord; and in this form it is of common occurrence in Ireland.

1020. It seems that this equity will not operate in favour of a stranger, by whom a voluntary and officious payment is made (*d*), but any creditor, sub-tenant, or other person interested in the preservation of the security (*e*), or, it is presumed, any one who lends at the instance of an interested person, will be entitled to the benefit of it; and if the lender be in receipt of the rents of the estate, he must apply them in redemption of this charge in priority to his own security (*f*).

The principle is not applied in bankruptcy, in favour of a mortgagee who pays rent which is due, or for which the landlord has distrained, so as to enable the mortgagee to stand in the landlord's place, and be preferred to other creditors, unless he have first applied to the court that he may have such priority in consideration of his paying the rent in arrear (*g*).

1021. One of several equitable incumbrancers may gain priority over the others by getting in a legal title in aid of his equity if he had no notice when he lent his money (995), for the court will not take from him the fruit of his diligence (*h*); but not if he originally took with notice of a prior security (*i*). And an incumbrancer can gain no advantage by taking a prior interest with notice of an agreement by the mortgagor not to dispose of that interest to the prejudice of the first mortgagee; as where (*k*) a tenant for life mortgaged his life estate and

(*c*) *Cormack v. Beisley*, 3 De G. & J. 157.

(*d*) *Fetherstone v. Mitchell*, 11 Ir. Eq. R. 35.

(*e*) *Id.*; *Locke v. Evans*, 11 Ir. Eq. R. 52; *Hill v. Browne*, 6 Id. 403; *Dru.* 426.

(*f*) *Sloane v. Mahon*, 1 Dr. & Wal. 189.

(*g*) *Anon.*, 1 Atk. 102; *Cocks, Exp.*, 3 D. & C. 8.

(*h*) *Barnett v. Weston*, 12 Ves. 130; *Bates v. Brothers*, 2 Sm. & G. 509; 17 Jur. 1174; *Sharpe v. Foy*, L. R., 4 Ch. 35.

(*i*) *Maxfield v. Burton*, L. R., 17 Eq. 15.

(*k*) *Hurst v. Hurst*, 16 Beav. 372.

covenanted not to exercise a power to raise portions: the mortgagees retained their priority over appointees of the portions who had notice of the agreement. And an equitable mortgagee, though originally without notice, can gain no priority by getting in a legal interest as against cestuis que trust of the mortgagor, after notice of their rights, for he takes subject to such rights, and becomes a trustee himself (*l*): as a person who takes a legal mortgage, with notice actual or constructive of an infirmity in the title, is subject to the equities existing against the title; and if the latter be set aside, the mortgage falls with it (*m*) (1002).

On the same principle an equitable mortgagee, with notice of a former mortgage, but without notice of a trust charge prior thereto, of which the former mortgagee had notice, takes subject to the charge (*n*).

The claim of the equitable mortgagee, against the mortgagor, will in like manner prevail (*o*) against the solicitor of the latter, into whose hands the deeds come after the equitable right has arisen; and will prevent the solicitor from acquiring as against him any lien on the deeds for his costs after that period. Nor will the lien, under such circumstances, arise where the costs have been partly incurred for the benefit of the equitable mortgagee, unless the solicitor were actually employed by him; the solicitor's lien being a right arising out of the relation between employer and employed (*p*) (295).

**1022.** The rule under which an incumbrancer without notice, having the legal estate, is protected, though he claim through one who had notice (1001), is also inapplicable where the interests are equitable: an equitable incumbrancer being unable, by concealing his notice from a person, who claims

(*l*) *Saunders v. Dehew*, 2 Vern. 271; *Allen v. Knight*, 5 Hare, 272; *Mumford v. Stohwasser*, L. R., 18 Eq. 556. Whether he can get priority if he acquire the legal interest without notice of the rights of the cestuis que trust, see (1002).

(*m*) *Cookson v. Lee*, 23 L. J. (Ch.) N. S. 473.

(*n*) *Earl Pomfret v. Windsor*, Belt's Sup. Ves. sen. 412; *Eland v. Eland*, 1 Beav. 235.

(*o*) *Molesworth v. Robins*, 2 Jo. & Lat. 358; *Pelly v. Wathen*, 1 De G., Mac. & G. 16; *Smith v. Chichester*, 2 Dru. & War. 393; *Blunden v. Desart*, Id. 405.

(*p*) *Pelly v. Wathen*, *supra*.



under him, to make his security more extensive, or give to his assignee a better right than that which he himself possesses. Therefore, where there were three successive mortgages to A., B. and C., and C. had notice of B.'s mortgage, and registered before him, and then assigned to D., who had no notice of B.'s mortgage, D. was held not to have priority over B. (*q*).

This rule applies to an equitable mortgage by a trustee of the property of his beneficiary. The mortgagee, claiming under a breach of trust, cannot set up his right against that of the beneficiary, although the latter, after intrusting his property to the trustee, have made no inquiry as to the manner in which he has disposed of it (*r*) (1002).

In fact where there is an infirmity in the title of a mortgagor, or an incapacity to contract, he can convey no equitable interest to his mortgagee (*s*); and on the ground that a right cannot generally be established in a mortgagee which did not exist in the person under whom he claims, a creditor who advanced money to clear off rent in arrear, in order to prevent ejectment against the devisee of a leasehold for lives, and took a mortgage to secure them, was not allowed priority over judgment creditors of the deviser (*t*).

**1023.** A *puisé* mortgagee cannot get any priority over an earlier equitable incumbrancer, of whose security he has notice, by the aid of the first mortgagee, the latter upon payment being only a trustee for the mortgagor, and unable to charge the estate. Thus where after successive mortgages to A. and B., a third mortgage was made to C., in which A. joined, and covenanted that after payment of his debt the estate should stand charged with C.'s mortgage; it was nevertheless held, that C. should follow in his regular order after

(*q*) Ford *v.* White, 16 Beav. 120; Tothill, 284; Duke's Char. Us. 639.

(*r*) Cory *v.* Eyre, 1 De G., J. & S. 149; Baillie *v.* M'Kewan, 35 Beav. 177; Shropshire Union, &c. Co. *v.* The Queen, L. R., 7 E. & I. 496.

(*s*) Robinson *v.* Briggs, 1 Sm. & Giff. 188; Collinson *v.* Lister, 20 Beav.

356; 7 De G., M. & G. 634; Parker *v.* Clarke, 30 Beav. 54; 7 Jur., N. S. 1267; Inman *v.* Inman, L. R., 15 Eq. 260.

(*t*) Angell *v.* Bryan, 2 Jo. & Lat. 763; and see Pinkett *v.* Wright, 2 Hare, 120; 12 Cl. & Fin. 764; Clack *v.* Holland, 18 Jur. 1007; 19 Beav. 262.

B. (u). Nor will any act of the first incumbrancer with the legal estate, amounting to an exercise of his rights unfair or injurious to succeeding incumbrancers, be allowed to prejudice the rights of the latter. Thus (x) if the first mortgagee permit the mortgagor to receive the profits without requiring interest, that interest shall not affect the land as against the second mortgagee, so as to keep him out longer than if it had been duly paid. And if the first mortgagee sell the estate, the produce shall go in discharge of his debt, whether it be received by him or by the mortgagor.

**1024.** The produce of the sale of an estate is bound by all the same equities and claims which bound the estate itself. Therefore (y), if the mortgagor of an estate, having a life interest in the mortgage money, assign it, and afterwards the estate be sold under proceedings against him in bankruptcy, but the proceeds are insufficient to discharge the mortgage, the mortgagee has a right, as against the assignee of the life interest in the debt, to retain the income of the produce of the sale until the mortgage be satisfied; for before the sale he had a right to retain the estate until payment of the whole debt. So, if the mortgagee, having notice of a subsequent mortgage, join with the mortgagor in selling to a stranger, the money received by either for the purchase shall sink so much of the prior debt for the benefit of the *puisné* mortgagee (z).

And if a *puisné* incumbrancer purchase the estate, not merely contracting for the equity of redemption, but for the estate free from incumbrances, he must apply the purchase-money according to the priorities in time of the several incumbrancers, and has no right to satisfy his own debt first, and then to come as a specialty creditor against the mortgagor in respect of the deficiency of the purchase-money to discharge the prior incumbrances (a).

(u) *Brotherton v. Hatt*, 2 Vern. 574.

(x) *Bentham v. Haincourt*, 1 Eq. Ca. Abr. 320.

(y) *Smith v. Smith*, 1 Y. & C. 338; see 1 Drew. 616.

(z) *Bentham v. Haincourt*, *supra*.

(a) *Greenwood v. Taylor*, 14 Sim. 403; *S. C. nom. A.-G. v. Cox*, 3 H. L. C. 240.

**1025.** Creditors under a decree for sale in a foreclosure suit, only stand (*b*), as to balances remaining due to them after the sale of the estate, in the same rank with creditors by bond and covenant. It was stated in the administration suit in which this decision occurred, that the Irish decree for sale is not a decree for payment of money, any more than the English decree of foreclosure (**539**), and is not allowed to be registered as a personal decree for payment. It can therefore give no priority against the other assets of the mortgagor over creditors by bond or covenant.

**1026.** The rule of payment according to time also applies, where the securities have been effected by fraud; provided, that among the incumbrancers themselves the equities are equal: so that where the mortgagor effected two securities by depositing part of the deeds with one person and part with another, the first had the preference (*c*). And where a sum of money having been paid by order of the Court of Chancery to a person, to be applied by him in part in the purchase of a house and furniture, which when purchased were to be conveyed to trustees, he bought a house, of which he took a conveyance to himself in fee, and afterwards deposited the title deeds with his bankers as a security for advances: it was held, that (*d*) according to the principles of the court, the prior trust, which was fastened on the property at the moment of the purchase, must prevail, whether the bankers had or had not (though it was assumed they had not) notice of the settlement. And so, if a trustee in part beneficially interested in the mortgage debt make an equitable mortgage or an equitable transfer as security for an advance to himself, the trust will prevail; and the possession of the deeds, thus acquired by a breach of trust, will not assist the subsequent mortgagee (*e*).

(*b*) *Wilson v. Lady Dunsany*, 18 Jur. 762; 18 Beav. 293.

(*c*) *Roberts v. Croft*, 24 Beav. 223; 2 De G. & J. 1; 27 L. J., Ch. 220; *Dixon v. Muckleston*, L. R., 8 Ch. 155.

(*d*) *Manningford v. Toleman*, 1 Col. 670.

(*e*) *Stackhouse v. Jersey*, 1 J. & H. 721; 7 Jur., N. S. 359; *Cory v. Eyre*, 1 De G., J. & S. 149; and see *Welshman v. Coventry Union Bank*, 8 W. R. 729, where it was held that there was notice of the trust; and see *Newton v. Newton*, L. R., 6 Eq. 135, and judg-

In another case (*f*), in which A., being entitled to a legacy charged on real estates, joined with the owner of the estates in assigning the fund to trustees, who were to hold it as a charge upon the estates, and afterwards released the fund without the concurrence of the trustees, and then (having with another become trustee in fee of the estates themselves) mortgaged them, first in fee, and again to a judgment creditor, who, in consideration of the mortgage, acknowledged satisfaction on her judgment: it was held, that the latter had priority over the trustees of the fund. The right to the fund was to be made out, it was said, through A. He had released it, and with his co-trustee had contracted to give the judgment creditor the benefit of a charge, instead of her judgment, upon which she entered up satisfaction on the faith of the contract and of the estate supposed to be vested in A. and his co-trustee. And though the release executed by A. was fraudulent as against his trustees, yet while it remained in force A. could not for them set up a title prior to a *bonâ fide* claimant on the equity of redemption of the estate, which was set free by that very release. It would be first necessary to establish an equity to set aside the release.

It is conceived that in this case the trustees might have preserved their priority, by putting notice of their settlement upon the title deeds. It is true, that as they were probably in the hands of the first mortgagee, the second mortgagee might even then have failed to get notice of it; but, unless the case were affected by some such neglect or want of equity, the decision seems hardly consistent with the principles commonly applied. It is difficult to see in the fact that A. had released the fund, a reason for giving priority to the subsequent mortgagee. It no doubt induced her to give up her judgment, but the trustees were not therefore the less innocent, were equally defrauded, and were earlier in time (1059).

**1027.** The right of trustees to be indemnified out of the trust estate in respect of the liabilities incurred in the exercise

ment of Lord Hatherley, S. C., 4 Ch. (f) *Greenwood v. Churchill*, 6 Beav. 143; *Thorpe v. Holdsworth*, 7 Eq. 139. 314,

of their office is to be preferred to any charge created by the cestui que trust (*g*).

**1028.** In giving to equitable incumbrancers, with equal equities, priority according to time, the court also considers, that as between the mortgagor and the mortgagee, the mortgage affects the entire interest of the former, saving only the rights of prior incumbrancers. A mortgagor, after making an equitable mortgage, retains no equitable interest prior to that mortgage, and can therefore convey none to a subsequent mortgagee. And upon this principle, where (*h*) A. mortgaged to B. the equity of redemption of real estate, reciting in the mortgage that a certain deed was deposited with C. as security for a debt charged on the same estate, but which was false, and A. did afterwards deposit the deed with C. as security for monies partly due before B.'s mortgage, it was held that C. had no priority over B. If, at the date of B.'s mortgage, there had been, as was recited, a security to C., which A. had afterwards paid off, or which had been otherwise avoided, B. would have had the benefit of the payment or avoidance. The whole of A.'s interest was in fact pledged to B., and he had nothing left in priority to that interest which he could transfer to C.

**1029.** It sometimes happens that an incumbrancer has priority over one of earlier date than himself, but not over another who is postponed to that incumbrancer; as where between securities dated in the order A. B. C., B. has priority over A. and C. over B.; but as between A. and C., A. has priority. Here if the fund available be not more than B.'s security will exhaust, it will be paid first to C., to the extent of the debt for which he has priority over B., and the balance to B. But it seems that if the fund be more than

(*g*) *Exhall Coal Co., Re*, 35 Beav. 449. And as to the paramount nature of the rights of consignees of West India estates, see per Turner, L. J., *Daniel v. Trotman*, 1 Moo. P. C., N. S.

123.

(*h*) *Frazer v. Jones*, 5 Hare, 481; on appeal, 17 L. J., Ch. 353; 12 Jur. 443; see *Hughes v. Williams*, 1 De G., Mac. & G. 690.

enough for B. all further sums received by C. will be for the benefit of A. (*i*). In a case in Ireland, where, by force of registration, a deed gained priority over one of earlier date, it was held that the former could not shake off intermediate judgments of earlier date than itself, but carried them up, as was said, "upon its back" (*h*).

**1030.** The question of priority between the unpaid vendor of real estate, in respect of his lien, and persons who claim under the purchaser, depends, like other questions of equitable priority, upon the circumstances of the case and the conduct of the parties, there being no especial equity attached to persons filling either of those characters (*l*); and as well between such persons as other equitable incumbrancers, an innocent incumbrancer, though later in time, will prevail over one who has less claim to equitable consideration.

**1031.** The possession of the title deeds is also of great importance in determining the priorities both of legal and equitable incumbrancers.

The right of a mortgagee who is postponed to another incumbrancer, to retain the possession which he has got, of the title deeds, has been the subject of much doubt. Although the owner of the estate is entitled to the possession of the deeds (*m*), it has been said, that being chattels, the person who is in actual possession of them may deal with them subject to the rights of the true owner; and that a court of equity will not interfere with the possession of a person who has obtained them for valuable consideration without notice of a wrongful title, but will leave the owner to his remedy at law (*n*). And an equitable mortgagee has been allowed to retain deeds acquired fairly and without notice against a mortgagee having the legal estate, and declared to be entitled to priority; and to

(*i*) *Benham v. Keane*, 1 J. & H. 685.

(*h*) *Sparrow v. Cooper*, 1 Jo. 72.

(*l*) *Rice v. Rice*, 2 Drew. 73. See *Garrard v. Frankel*, 30 Beav. 445.

(*m*) See *Smith v. Chichester*, 2 D. & War. 393.

(*n*) *Joyce v. De Moleyns*, 2 J. & L. 374; *Walwyn v. Lee*, 9 Ves. 24.

use them as he could in obtaining payment of his debt (*o*). But it was intimated by the Court of Appeal in another case (*p*), that the doctrine does not apply where, either from the fund being in court or in consequence of the legal estate being outstanding in a trustee, and the beneficial interest being claimed by several adverse but equally innocent purchasers for value without notice, the court declares the right to the estate or fund; and that in such a case the decree would be incomplete, if, while declaring the plaintiff to be absolutely entitled to the whole beneficial interest, it left the title deeds in the possession of a defendant claiming to hold them under an adverse title, which the same decree declared to have no valid foundation. And in the same case (*q*) Lord Romilly (to whose views the Court of Appeal expressed themselves as not adverse) considered that, assuming the right of the prior incumbrancer to a declaration of priority, the question depends upon whether the person creating the charge in favour of the subsequent claimant had any beneficial interest in the subject-matter which he proposed to charge; if he had, then the person who claimed under him and had possession of the deeds would be entitled to hold them till he was redeemed or foreclosed: otherwise, if there were no interest in the person creating the charge. But neither of these modifications of the rule agrees with the decision in *Joyce v. De Moleyns*, where the holder of the deeds received them from a person who had no beneficial interest in them.

In *Hunt v. Elmes* (*r*), *Heath v. Crealock* (*s*), and *Waldy v. Gray* (*t*), the deeds were honestly received from persons who had an equity of redemption in the property to which they related, but whose possession was fraudulent; and although declarations of priority were made against the holders, orders for delivery of the deeds were refused: and in *Heath v. Crealock*, decided by Lord Cairns and by James and Mellish, L.JJ., it was said, by Sir W. M. James, L. J., to be a rule

(*o*) *Fagg v. James*, 8 L. T., N. S.  
5; and see *Heath v. Crealock*, L. R.,  
10 Ch. 22.

(*p*) *Newton v. Newton*, L. R., 4 Ch.  
143.

(*q*) L. R., 6 Eq. 140.

(*r*) 2 De G., F. & J. 578.

(*s*) L. R., 10 Ch. 22.

(*t*) L. R., 20 Eq. 238.

without exception, that from a purchaser for value without notice the court takes away nothing directly or indirectly which that purchaser has honestly acquired. If, however, the security relates to part only of the estate and an order be made for the sale of the whole, the mortgagee may be ordered to produce the deeds for the purposes of the sale and to allow attested copies to be taken (*u*).

An equitable mortgagee will not be ordered in bankruptcy to deliver up his deeds to the trustee, to enable him to proceed with a sale of the property, before payment of the mortgage debt and the interest and costs of the mortgagee into court (*x*).

**1032.** The redelivery of the deeds to the mortgagor by a mortgagee, who has once acquired possession of them, amounts, as regards persons who have subsequently lent their money on the faith of the mortgagor's possession as owner, to a discharge *pro tanto* of the security; and it has been thought convenient to consider under that head the authorities which relate both to the original taking or neglect to take the deeds, and to the return of them to the mortgagor or his assignee, without receiving the sum which is due upon the security (**1408**).

*Of the Right to consolidate several Securities.*

**1033.** If the owner of different estates mortgage them to one person, separately, for distinct debts, or successively, to secure the same debt, or the same debt with further advances, the mortgagee may insist that one security shall not be redeemed alone (*y*); upon the principle that redemption being an equitable right, the person who redeems must on his part do equity towards the mortgagee, and redeem him entirely (*z*)—not taking one of his securities, and leaving him exposed to the risk of deficiency as to the other.

This doctrine was acted upon by Courts of Law, in applica-

(*u*) *Thorpe v. Holdsworth*, L. R., 7 Eq. 139.

(*x*) *Ditton, Exp.*, L. R., 1 Ch. Div. 557.

(*y*) *Shuttleworth v. Laycock*, 1 Vern.

245; *Pope v. Onslow*, 2 Id. 286; *Jones v. Smith*, 2 Ves. jun. 376; *Collet v. Munden*, cited there.

(*z*) *Willie v. Lugg*, 2 Eden, 78.



tions under the statute of Geo. II. to stay proceedings, on payment of principal, interest and costs (*a*); and it appears to have been recognized in other proceedings at law (*b*). It depends upon a principle altogether different from that upon which the doctrine of tacking, properly so called, is founded; although the circumstance, that the union of two or more securities is common to both, has caused it sometimes to be treated as a branch of that doctrine. In tacking, the right is to throw several debts, one or more of which are either lent upon inferior securities on the *same* estate, or are mere specialty debts, upon the protection of the legal estate, the dominion over which is the very foundation of the right (994); but the right which is now to be considered depends upon the equitable principle that he who seeks the aid of the court must do equity himself; and it enables a mortgagee to unite, and to hold united, securities on *different* estates until payment of the debts charged on both of them—to make one estate liable for a debt specifically charged on another. To give a right to tack, one debt only needs to have been lent on the credit of the estate (1003); it is sufficient that the other be merely a lien upon it, and where the doctrine of circuitry applies, even that is unnecessary (1014); but the essence of the other doctrine is, that there shall be several estates, each specifically liable for a particular debt. To the one notice at the time of the advance is fatal (1007); in the other, the right belongs to a mortgagee, who has taken several securities from the same mortgagor, and who, therefore, of necessity, has notice of the first mortgage, when he takes the second.

**1034.** The mortgagee has a right to the benefit of this rule, though the securities be made to trustees, and even where they are made to different sets of trustees (*c*); and if the mortgages be made to different mortgagees, one of whom takes an assignment from the other of his security, the securities may be united, whether the assignee had an interest which entitled him to re-

(*a*) *Roe v. Kaye v. Soley*, 2 W. Bl. 587.  
726.

(*c*) *Tassell v. Smith*, 2 De G. & J.

(*b*) See *Marcon v. Bloxam*, 11 Exch. 713; 4 Jur., N. S. 1090.

quire an assignment (as where he was surety for that debt (*d*)), or whether he had no such interest (*e*); and although upon taking the assignment he had notice of a subsequent incumbrance, the owner of which would be affected by the union of the prior securities (*f*): because it is said the latter might have contemplated the possible consolidation of the mortgage which precedes his own with a security on another estate. But consolidation was refused where the security on the second estate was not in existence at the date of the subsequent securities on the first estate, and the assignor of the prior security on the latter had notice of those subsequent securities at the date of the assignment (*g*).

**1035.** Nor is the right of the mortgagee affected by reason of his selling one of the estates under his power (*h*); or by an assignment taken after the bankruptcy of the mortgagor (though the holder of an original security taken after notice of the insolvent state of the mortgagor will not, in bankruptcy, be allowed to gain a preference by consolidating it with an earlier security for another debt (*i*)); or by any other change in the ownership of the equity of redemption, either by descent, sale, mortgage or other devolution of the estates (*k*); but the mortgagee may hold both, even against the purchaser or mortgagee of the equity of redemption of one of them without notice of the other mortgage, until payment of all that is due on both (*l*); and though the security of such a *puisé* mortgagee be earlier in date, but postponed from another consideration (*m*). And

(*d*) *Tweedale v. Tweedale*, 23 Beav. 341.

(*e*) *Vint v. Padgett*, 1 Giff. 446; 2 De G. & J. 611; 4 Jur., N. S. 254, 1122.

(*f*) *Vint v. Padgett*, *supra*.

(*g*) *Baker v. Gray*, L. R., 1 Ch. Div. 491.

(*h*) *Selby v. Pomfret*, 1 J. & H. 336; 7 Jur., N. S. 836, 860.

(*i*) *Hodgkin, Exp.*, L. R., 20 Eq. 746.

(*k*) *Alsager, Exp.*, 2 M. D. & De G. 328; *Selby v. Pomfret*, *supra*; *Margrave v. Le Hooke*, 2 Vern. 207;

*Carter, Exp.*, Ambl. 733; *Ireson v. Denn*, 2 Cox, Ch. Ca. 425; *Tribourg v. Pomfret*, cited Ambl. 733; *Titley v. Davies*, 2 Y. & C. C. C. 399; *Palk v. Lord Clinton*, 12 Ves. 48; *Cator v. Charlton*, *Collet v. Munden*, cited 2 Ves. jun. 377, and *Lord Alvanley's* judgment there. *Fosbrooke v. Walker*, 2 L. J., N. S., Ch. 161, is contrary to the current of authorities.

(*l*) *Ireson v. Denn*, *supra*; *Neve v. Pennell*, 2 H. & M. 170; 33 L. J., Ch. 19.

(*m*) *Neve v. Pennell*, *supra*.

the purchaser or other assignee may then hold until he be redeemed, both as to his own security and what he paid when he redeemed the original mortgagee (*n*). So that a *puisné* mortgagee has thus the power of throwing his debt upon an estate, which the mortgagor never made subject to it. And where three estates, A., B. and C., were mortgaged (*o*), and then A. was sold, and the purchaser paid off the mortgage and got the legal estate; it was held, that he might compel *puisné* mortgagees of B. and C., having also a security on another estate, D., to pay him all that he had paid to the first mortgagee, taking only a conveyance of B. and C., or to be foreclosed as to those estates.

**1036.** But as to the right of the assignee to hold both estates, where, subsequently to the mortgage of both, one of them was sold, and the other mortgaged, Lord Hardwicke seems to have thought (*p*), that in such a case the equitable mortgagee may throw his debt upon the purchased estate, by redemption of the original mortgage, only when the sale is subsequent to, and not when it precedes, his mortgage; because, when the sale comes first, the mortgagor has no longer a right of redemption in him as to the estate sold, and can therefore convey none to the mortgagee. But he said, it would be different, if that estate had only been mortgaged, for then the mortgagor could have passed his right of redemption. It is not, however, from the mortgagor that the assignee of the equity of redemption acquires the right to hold both estates; nor does the mortgagor in fact, upon making a second mortgage of one estate, pass his equity of redemption in the other; all that he passes, in the other estate, is a possibility, enabling the *puisné* mortgagee to get at that estate, through the right which the first mortgagee has over it—by redeeming him, and getting the benefit of his securities. Now the prior mortgagee may clearly hold against the subsequent purchaser of the equity of redemption; for his security is prior to the sale: if then the

(*n*) Titley v. Davies, 2 Y. & C. C. C. 399; Bovey v. Skipwith, 1 Ch. Ca. 201.

(*o*) Sober v. Kemp, 6 Hare, 155.

(*p*) Titley v. Davies, *supra*. See marg. note from Serjt. Hill's MS.

assignee steps into his place, and derives his right through him (and he has no other equity), it does not appear why he may not hold against a purchaser as well as against a mortgagee (*p*). But it is not clear that the point was raised.

**1037.** It seems, however, that the redeeming assignee may be deprived of his right to hold both securities, or more properly he may be prevented from acquiring this right, either by the mortgagor or the original mortgagee (*q*): the mortgagor may do this by redeeming the first mortgagee himself; and the first mortgagee by parting with one of his securities before he is redeemed; for the estate, being then no longer liable to his debt, the *puisné* mortgagee who redeems can acquire no title to it.

**1038.** A mortgagee is entitled to be redeemed as to both securities, whether they unite in him before or after the equities of redemption have been united in the hands of a purchaser or *puisné* mortgagee; who take subject to the equities which subsisted against the mortgagor (*r*). It has been held to be otherwise where the securities united in the mortgagee for the first time after the separation of the equities of redemption of the several estates, though the persons in whom they were vested, being devisees of the former owner, were only volunteers. But it was intimated that there might have been some ground for the latter claim, if the mortgagee had become possessed of both the securities whilst the equities were yet in the hands of the same owner, though he had acquired them at different times (*s*). The distinction taken in this case is, however, open to much doubt, although it was some time after recognized by the Court of Exchequer (*t*). It proceeded upon the principle, now overruled, that it was the possession by the mortgagee of the legal

(*p*) And see *Beevor v. Luck*, L. R., 1122; *Beevor v. Luck*, L. R., 4 Eq. 537.

(*q*) *Titely v. Davies*, supra. See marg. note from Serjt. Hill's MS.

(*r*) *Vint v. Padgett*, 1 Giff. 446; 2 De G. & J. 611; 4 Jur., N. S. 254,

(*s*) *White v. Hillacre*, 3 Y. & C. 597.

(*t*) *Marcon v. Bloxam*, 11 Exch. 586.

estate in the two properties which entitled him to consolidate (1042).

1039. Where the whole estate was mortgaged to A. in 1821, to secure 6,000*l.*, the equity of redemption being as to one-third in X., and as to two-thirds in Y.; and then in 1831, X.'s third was conveyed to B. to secure 12,000*l.*; and in 1833, Y.'s two-thirds to C. to secure 2,106*l.*; and in 1838, the mortgages to A. and C. were assigned to D.: the case was treated as if the securities to B. and C. were charges upon different estates, and D., the assignee, was not allowed to retain the securities to A. and C. as against B., until payment by the latter of all that was due on those securities. The decree (*u*), therefore, was for redemption by B., the second mortgagee of one-third, of all that was due on the security of 1821, which affected the whole estate, and, in default, foreclosure. Then for an account of subsequent interest due to D. in respect of the mortgage to C. of the two-thirds (1833), with a direction to distinguish the amount due on the mortgage of 1821, and to divide the same into three parts; and for redemption on payment by X. of one-third of the amount due on the last-mentioned mortgage, and by Y. of the other two-thirds thereof, and also of the sum due on the mortgage to C. of 1833; in default of payment, X. and Y. being severally foreclosed. In case of redemption by B., an account was directed of the amount due on his security (1831), and subsequent interest on what he should pay D.; and redemption by D., on payment of all found due to B., and in default foreclosure.

Provision was then made for redemption by X. and Y. respectively, and in default for foreclosure of them respectively, in similar terms *mutatis mutandis*, having regard to their respective shares. In case D. should redeem B., an account of the sum due to D. in respect of C.'s security (1833), and subsequent interest on what he should pay B.; and redemption directed by X. and Y., and, in default, foreclosure of them

(*u*) *Thornycroft v. Crockett*, 2 H. of L. C. 239.

respectively, in similar terms *mutatis mutandis*, having regard to their respective shares in the mortgaged premises.

In this case B., by virtue of the rule, that a mortgagee ought not to be redeemed in part (1429), was called upon to redeem the whole security of 1821, which affected all the estate; but as to the right of redemption given to X. and Y., it was different, because their rights arose out of mortgages of distinct shares of the estate, effected after the splitting of the equity of redemption.

**1040.** Nor is the mortgagee with several securities entitled to the discharge of both debts, against a person who happens to be engaged (*x*) with another in one mortgage only, though his co-mortgagor may have pledged another estate to the same mortgagee. As where a mortgagee of one estate takes a second mortgage thereon as further security for an advance to another person, whose estate is also mortgaged to secure the same debt (*y*). The estate of the latter is here only liable for the sum advanced to him; but the estate of the first mortgagor is liable for both debts. In like manner, if two join in mortgaging their several estates to the same mortgagee, to secure a sum advanced to them both, or to one of them only, and then one mortgages to the same mortgagee, for his own debt, property, part of which was included in the former mortgage (*z*); he who is not mixed up with the last security shall not have the *onus* of redeeming it. And so where different interests in the same estate are mortgaged, and one of the owners afterwards mortgages his interest alone. As where a dowress and heir-at-law mortgaged the estate, which had descended subject to a mortgage, and then the heir mortgaged again; the dowress was held entitled to her dower (*a*), subject only to payment of the ancestor's mortgage, and of that in which she had herself joined, with the interest and so much of the costs of suit as related to those sums. In all which instances it will be ob-

(*x*) Jones v. Smith, 2 Ves. jun. 376.

(*y*) Aldworth v. Robinson, 2 Beav.

287.

(*z*) Higgins v. Frankis, 15 L. J., Ch.

329; 10 Jur. 328; Bowker v. Bull, 1 Sim., N. S. 29.

(*a*) Jones v. Griffith, 2 Coll. 207.

served, that, though the securities were all in one hand, the equities of redemption in the estates, or in different interests in the same estate, were vested in divers owners.

**1041.** Where a tenant for life had charged the estate (*b*) in exercise of a power reserved to him, and had mortgaged the charge with other property to a second mortgagee, it was held, that the remainderman might redeem the latter without paying off his whole debt; on the ground that the burthen of the whole redemption would in effect be an increase, by so much, of the charge; making the estate of no value to those in remainder; but it was intimated, that there was a distinction between the cases of the mortgagor and of the remainderman.

**1042.** The right of the mortgagee to hold both securities formerly seems to have been considered to be limited to cases in which both were legal securities; and this appears actually to have been the case in the early examples of the rule. Sir W. Grant says (*c*):—"If two separate estates are mortgaged, by which, I understand, the legal interest absolutely, and, at law, irredeemably, conveyed, this court will not interpose in favour of the redemption of one without the redemption of both." And again,—“If there are two legal mortgages, which at law are become absolute, the mortgagee shall insist upon being redeemed as to both or neither.” And Alderson, B., says (*d*),—"Where a mortgagee is in possession of the legal estate in two properties." In a case (*e*) where a second (equitable) mortgagee of one estate, upon discharge of the first mortgage by sale of part of the mortgaged property, became entitled to and filed a bill to enforce an assignment of the legal estate in the residue, the question was raised whether this was an interest enabling him to hold it, with another security given him by the same mortgagor, on a different estate, against the mortgagor's assignees. But the point was not decided. Assuming the necessity for a possession of the legal interest,

(*b*) Lord Kensington *v.* Bouverie,  
19 Beav. 39.  
(*e*) 2 Ves. jun. 376.

(*d*) 3 Y. & C. 609.  
(*e*) Grugeon *v.* Gerrard, 4 Y. & C.  
119.

it would seem, upon the principle already noticed (998), that the best right to call for the legal estate, accompanied by an assertion of ownership, is equivalent in these matters to the actual possession of it, that this question might have been well answered in the affirmative (*f*).

But it is now settled that a mere equitable interest in the securities will enable the mortgagee to hold them both, the right not being founded upon any principle connected with the legal estate. Where A. assigned a reversionary interest in equitable personalty to B., and secondly to C. (a mortgagee under A. of freehold and leasehold estates), upon trust for sale, and payment of the residue to A., and then sold to D., who, before completing his purchase, paid off B.; and A. declared, that until execution of the assignment to D., he should stand in B.'s place and have the benefit of her security; it was held (*g*) that C. might foreclose against A. and D. (the latter being adjudged to be entitled to the benefit of B.'s security), in default of payment of both his securities. Here all the interests in the personalty were of necessity equitable, but the rule was put into operation in favour of a *puisné*, and against a prior incumbrance, on that fund.

**1043.** The right of complete redemption overrides the right of the surety (1153) for one of the debts, who discharges it, to have the full benefit of the security for that debt; unless there be a special contract that the surety's right shall have priority; or unless fraud or misrepresentation against the surety have affected the rights of the mortgagee (*h*). A contract in the surety's favour will not be inferred, from the mere fact that the suretyship extends only to one of the debts, and that he refused to be bound for the other.

(*f*) And see *Berridge, Exp.*, 3 Mont., Dea. & De G. 464; *Higgins v. Frankis*, 15 L. J., Ch. 329; 10 Jur. 328.

(*g*) *Watts v. Symes*, 16 Sim. 640; and 1 De G., Mac. & G. 240; *Neve v. Pennell*, 2 H. & M. 170; per Sir W. P. Wood; and see *Berridge, Exp.*, 3 Mont., Dea. & De G. 464, where the

rule was applied in bankruptcy by directing an account of what was due upon all the securities.

(*h*) *Farebrother v. Wodehouse*, 23 Beav. 18; 2 Jur., N. S. 1178; 26 L. J., Ch. 81. Appeal compromised, 26 L. J., Ch. 240.



**1044.** The incumbrancer may also unite securities of different natures, as an assignment of equitable personalty with a mortgage upon freeholds and leaseholds (*i*).

**1045.** The right of the mortgagee to be redeemed as to his whole security applies whether the suit be by a person actively seeking the aid of equity to redeem, or a foreclosure suit, where the mortgagee, who is liable to be redeemed, comes to enforce his legal right (*k*). So in bankruptcy the mortgagee has this right, whether the application to the court be by him or not, it being now well settled, that whether the suit is for foreclosure or redemption, the mortgagee is equally entitled to say to the mortgagor, "You must redeem entirely or not at all" (*l*) (1664).

It is clear, on the other hand, that the mortgagor cannot insist upon this rule as against the *puisné* mortgagee of several estates, of which there are prior mortgagees to different persons. Either of such persons may be redeemed separately by the *puisné* mortgagee, notwithstanding the mortgagor's objection (*m*). There is no question here of leaving either of the prior mortgagees a part of his security which may be deficient, nor does it concern either of them, whether the other be redeemed or not. And if the *puisné* mortgagee seek to redeem those prior to him in one suit (which he may do if they do not object) he may still have a decree to redeem them separately; for this mode of proceeding will not alter his

(*i*) *Watts v. Symes*, 16 Sim. 640; and see *Spalding v. Thompson*, 26 Beav. 637; *Tassell v. Smith*, 2 De G. & J. 713. So in *Jones v. Smith*, 2 Ves. J. 376, which was reversed by the House of Lords; but the reasons do not appear, and there seems no doubt on the point.

(*k*) *Tribourg v. Lord Pomfret*, cited *Ambl.* 733.

(*l*) *Berridge, Exp.*, 3 M., D. & De G. 464; *Watts v. Symes*, 1 De G., Mac. & G. 240; *Selby v. Pomfret*, 7 Jur., N. S. 836, 860; 1 J. & H. 336; 3

De G., F. & J. 595; notwithstanding *Smeathman v. Bray*, 15 Jur. 1051; *Holmes v. Turner*, 7 Hare, 367, n. The terms of redemption are the same whether they be ascertained in a suit for redemption or foreclosure. (2 Hare, 384; 6 Id. 160.) The point in question was not argued before Wigram, V.-C., and no reason is given for the decision, which may have been on the ground that both the mortgages were not legal. They were so in *Smeathman v. Bray*.

(*m*) *Pelly v. Wathen*, 7 Hare, 351; See S. C., 1 De G., Mac. & G. 16.

rights as between him and the mortgagor, or prevent him from giving up his right to part of the security if he shall see fit, and working out his claim against the rest (1670).

**1046.** Nor does the right of retainer arise where one security has been satisfied before the other was complete. Therefore where there was a mortgage on one estate, and a judgment was also recovered, and the debt was paid into court, and taken out by the mortgagee, before he had recovered judgment in respect of a mortgage debt charged on another estate (the security for which was held to be invalid), it was held that he could not retain the deeds, and refuse to reconvey the estate comprised in the satisfied mortgage, until payment of the second judgment (*n*).



#### CHAPTER VII. PART 3.—OF PRIORITY UNDER SECURITIES UPON CHATTELS PERSONAL AND CHOSSES IN ACTION; AND UPON SHIPS UNDER THE MARITIME LAW.

**1047.** *Of Priority in Securities upon Chattels Personal and Choses in Action.*

**1060.** *Of Priority under the Maritime Law.*

**1047.** If a bonâ fide incumbrancer, without notice of a prior charge upon a chose in action or personal property in the hands of a third person obtains possession (*o*), or gives notice of his own charge to the person who has the legal interest in or control over the property, he shall generally be preferred to an earlier claimant who has not taken possession, or who has given later or no notice (*p*), unless the holder of the property have by other means acquired sufficient notice of the earlier claim (*q*) (888).

(*n*) *Mayor of Brecon v. Seymour*, 26 Beav. 548; 5 Jur., N. S. 1069.

(*o*) *Daniel v. Russell*, 14 Ves. 392.

(*p*) *Dearle v. Hall*, 3 Russ. 1; *Loveridge v. Cooper*, id. 30; *Foster v. Blackstone*, 1 M. & K. 297; *Foster v. Cockerell*, 9 Bli., N. S. 332; *Meux v. Bell*, 1 Hare, 73; *Hulton v. Sandys*,

*Younge*, 602; *Lee v. Howlett*, 2 K. & J. 531. Under the Policies of Assurance Act, 1867, the date of notice of assignment of policies regulates the priority of all claims under the assignment. (Sect. 3.)

(*q*) *Lloyd v. Banks*, L. R., 3 Ch. 488.

Before taking his security, he ought however to inquire if any notice have already been given (*r*); but he shall not suffer from neglecting to do so, if by inquiry he could have got no information as to the earlier charge—as if one trustee only had notice of it and had died (*s*).

**1048.** The notice will be effectual when the fund is in the hands of the person who is to apply it, though it be not actually payable (*t*). But it does not disturb the order of priority until the fund has reached his hands, or has become due from him. Therefore an assignee who gives notice at any time before that period will retain the priority which is given by the date of his security, against another incumbrancer of later date who has given an earlier notice (*u*). This rule has been applied to an attachment (*v*) issued out of the Court of the Lord Mayor of London, against a fund, before it has come to the trustee's hands.

A result of this rule is, that an incumbrancer of later date may obtain priority, notwithstanding the utmost diligence of one earlier in time in giving notice of his security. For if the later incumbrance be made in favour of the trustee or holder of the fund himself, no notice by the owner of the prior incumbrance will affect the security of the trustee. The notice will not operate before the fund comes into the trustee's possession; and when he receives it, the notice of his own security will first attach and give him precedence (*x*).

Notice should nevertheless be given at the earliest period, for though the trustee has priority in respect of all charges existing in his favour at the date of the notice, he cannot afterwards acquire any new charge or right of set-off, and he is from that time bound to withhold all further payments on

(*r*) *Smith v. Smith*, 2 Cro. & M. 231.

(*s*) *Meux v. Bell*, *supra*; *Foster v. Blackstone*, *supra*.

(*t*) *Addison v. Cox*, L. R., 8 Ch. 76; and it should be given to the persons who have the actual control of the fund at the date of the charge. (*Bridge*

*v. Beadon*, L. R., 3 Eq. 664.)

(*u*) *Buller v. Plunkett*, 1 J. & H. 441; 7 Jur., N. S. 873; see *Suffolk, Earl of v. Cox*, 15 W. R. 733.

(*v*) *Webster v. Webster*, 31 Beav. 393; 8 Jur., N. S. 1047.

(*x*) *Somerset v. Cox*, 33 Beav. 634; 10 Jur., N. S. 351; 33 L. J., Ch. 490.

account of the mortgagor, unless made with the mortgagee's consent (*y*).

**1049.** The priority of the holder of the fund extends not only to actual charges, but to all rights of set-off and other equities existing between him, or the estate out of which the fund is payable, and the person entitled to the fund subject to the incumbrances (*z*).

**1050.** An incumbrancer (*a*) upon a fund in court should apply for a stop order, of which notice should be given to all persons who have obtained similar orders upon the fund (*b*), and which will be as effectual as notice in other cases in giving priority (*c*); like notice also, it applies only to the particular charge in respect of which it is obtained, though it be granted against the whole fund (*d*). If after the stop order have been obtained the share is carried over to the account of the mortgagor and his incumbrancers, a stop order obtained by a later mortgagee will not affect the priority of him who obtained the first, though it seems it would be otherwise if the fund were carried over to the account of the mortgagor alone (*e*). The right thus acquired by a *puiſné* incumbrancer without notice cannot be disturbed by a mere notice to the paymaster general, who is not a trustee of the funds in his hands, but only the agent of the court (900).

**1051.** When a person who has a lien upon a fund, of which he is the holder, pays it into court, he should state his

(*y*) *Stephens v. Venables*, 30 Beav. 625.

(*z*) *Webster v. Webster*, *Stephens v. Venables*, *supra*. See *Willes v. Greenhill*, 29 Beav. 376; 4 De G., F. & J. 147, on question of notice; *Nelson v. London Assurance Co.*, 2 Sim. & St. 292.

(*a*) *Greening v. Beckford*, 5 Sim. 195.

(*b*) *Hulkes v. Day*, 10 Sim. 41. Since the Judicature Acts, it is not necessary for a person, who has reco-

vered judgment in a division other than the Chancery Division of the High Court, to obtain a charging order before applying for a stop order on a fund standing to the credit of the Chancery Division. (*Hopewell v. Barnes*, L. R., 1 Ch. Div. 630.)

(*c*) *Greening v. Beckford*, *supra*; *Warburton v. Hill, Kay*, 470.

(*d*) *McLeod v. Buchanan*, 33 Beav. 234; 9 Jur., N. S. 1266; 10 Id. 223.

(*e*) *Lister v. Tidd*, L. R., 4 Eq. 462.

claim and obtain a stop order, otherwise he may lose his priority as against a creditor without notice of the lien, who gets such an order (*f*). But if before conversion and payment into court of the proceeds of incumbered property, an incumbrancer has completed his title by giving notice to the holder, an earlier stop order obtained by another claimant will not affect his priority (*g*). So if there be no fund in court, which could be the subject of a stop order before the bankruptcy of the assignor, and the assignee have given notice, he will have a better right than the bankruptcy trustee to the fund when brought into court (*h*). And until the court has made itself the trustee by dealing with the fund, or so long as any thing remains to be done in connection with it, wherein the trustee's concurrence is necessary, notice to him will give priority (*i*). It has however been held that if the trustee himself make the advance, the fund being in court, he is bound to obtain a stop order, so that any other person who proposes to make an advance may ascertain whether the fund is incumbered (*k*).

Where several stop orders have been obtained on the same day, a prior notice by one of the creditors will give priority to his claim (*l*).

**1052.** The rule as to giving notice is binding upon the trustee in the bankruptcy of a person interested in the fund, whose omission to give it will cause the postponement of his interest to that of a subsequent assignee for value by whom notice has been given (*m*). This is upon the principle that the bankruptcy trustee stands in no better position than the bankrupt, and is equally subject to all the rules concerning

(*f*) *Swayne v. Swayne*, 11 Beav. 463.

(*g*) *Brearclyff v. Dorrington*, 4 De G. & S. 122; *Livesey v. Harding*, 23 Beav. 141. See *Etty v. Bridges*, 2 Y. & C. C. C. 486.

(*h*) *Day v. Day*, 1 De G. & J. 144; S. C. 23 Beav. 391; 3 Jur., N. S. 403, 782.

(*i*) *Warburton v. Hill, Kay*, 470;

*Matthews v. Gabb*, 15 Sim. 51; *Thompson v. Tomkins*, 2 Dr. & Sm. 8.

(*k*) *Elder v. Maclean*, 3 Jur., N. S. 283.

(*l*) *Timson v. Ramsbottom*, 2 Keen, 35.

(*m*) *Barr's Trusts*, Re, 4 K. & J. 219; 4 Jur., N. S. 1013; *Lloyd v. Banks*, L. R., 4 Eq. 223; see *Id.* 3 Ch. 488; *Russell's Policy Trusts*, Re, L. R., 15 Eq. 26.

equitable rights. The same principle was applicable under the Insolvent Act (*n*).

The bankruptcy trustee of the assignor of such property as falls within the order and disposition clause of the Bankruptcy Act (*o*) so far stands in a higher position than the bankrupt, that whereas under ordinary circumstances the title of the particular assignee is complete as between him and the assignor, without any notice by the former (the notice being material only as between the assignee and a third party, and the absence of notice alone being no evidence of the invalidity of the assignment (*p*)), the bankruptcy trustee of the assignor, where notice has not been given at all or until after the bankruptcy, will be entitled to the fund against the particular assignee himself, whether it fall into possession before or after the bankruptcy, and though the bankrupt's interest was only contingent, because the fund is within the order and disposition of the bankrupt with the consent of the particular assignee, of which consent his neglect to give notice is evidence (*q*).

**1053.** The bankruptcy trustee however will not become entitled, where the mortgagee would have completed his title but for the false representation of the mortgagor (*r*), nor where the absence of notice does not arise from neglect (*s*). Therefore assignees in bankruptcy were not preferred to an assignee under a prior insolvency, who before payment of the fund into court

(*n*) *Atkinson's Trust*, Re, 2 De G., M. & G. 140; 16 Jur. 1003; 4 De G. & S. 548; Re *Cawthorne*, Id. 551, *u*.

(*o*) Bankruptcy Act, 1869, s. 15.

(*p*) *Dearle v. Hall*, 1 Russ. 24; *Cook v. Black*, 1 Hare, 390. See *Hobson v. Bell*, 3 Jur. 190.

(*q*) *Bartlett v. Bartlett*, 1 De G. & J. 127; 3 Sm. & G. 533; 3 Jur., N. S. 284, 705; *Lucas, Exp.*, 3 De G. & J. 113; *Vickress, Re*, 7 W. R. 542; *Caldwell, Exp.*, L. R., 13 Eq. 188. The decision in *Bartlett v. Bartlett* must also be taken to have overruled *Pole's Trusts, Re*, 2 Jur., N. S. 685, where it was held that the assignee by deed of a reversionary interest in money, who

had not given notice, was entitled to priority over the assignor's assignees in insolvency under the Indian Act, 11 & 12 Vict. c. 21, s. 7, which contains an order and disposition clause. See *Grainge v. Warner*, 13 W. R. 833; *Barry, Exp.*, L. R., 17 Eq. 112, a case of a chose in action, and therefore not within the rule under the Act of 1869. The cases of *Stuart v. Cockerell*, L. R., 8 Eq. 607; and *Russell's Trusts, Re*, 15 id. 26, ignore the effect of the statute on the title of assignees in bankruptcy. See *Bartlett v. Bartlett*, *supra*.

(*r*) *Belt, Exp.*, De G. 577.

(*s*) *Rawbone, Re*, 3 K. & J. 476; S. C. id. 300; 3 Jur., N. S. 556, 837.

had no knowledge or notice of the insolvent's interest in it; there being, under such circumstances, no consent, or laches which would be equivalent to consent, to the possession of the bankrupt (*t*).

**1054.** The title of a person, who claims under a declaration of trust, is completed by the declaration of trust; and a subsequent incumbrancer cannot gain priority over the *cestui que trust* by giving notice. Therefore where (*u*) shares in a banking company stood in the name of a trustee, who executed a declaration of trust of them, of which no notice was given to the company, and afterwards pledged part of them, together with others belonging to himself, to the company, it was held, that against the latter, the *cestuis que trust* were entitled to such of the shares pledged as could be ascertained to have belonged to them. The authority of Lord Langdale is indeed against this doctrine (*x*); but V.-C. Wigram's decision was affirmed in the House of Lords, and has been since followed by Lord Romilly, M. R. (*y*). The latter learned judge attempted to reconcile the conflicting decisions, on the ground that a violation of duty, and something like fraud by the assignor, governed the case of *Martin v. Sedgwick*. The case was simply this,—A. being bound by the rules of an insurance office, with which he was connected, to keep on foot a certain insurance on every share held by him, and desiring to hold more shares without increasing his insurance, bought a number of shares, and transferred them into the name of B. as his trustee; B. being then insured, but not a holder of shares, and therefore not under the necessity of effecting any further insurance.

B. executed a declaration of trust of the shares to A., but

(*t*) The mortgagee was also preferred to the assignees, where the fund having been transferred into the mortgagor's name without his knowledge, was held not to be in his order and disposition with his consent. (Richardson, Exp., Buck, 480; Mont. & C. 43.)

(*u*) *Pinkett v. Wright*, 2 Hare, 120; 12 Cl. & Fin. 764, nom. *Murray v. Pinkett*.

(*x*) *Martin v. Sedgwick*, 9 Beav. 333.

(*y*) *Clack v. Holland*, 18 Jur. 1007; 19 Beav. 262.

the latter gave no notice to the office, and B. afterwards mortgaged the shares to C., who gave notice, and was held entitled to priority over A. It certainly appears, as was observed by Lord Romilly, that the act of A. was in violation of his contract, a species of fraud, and an evasion of the rules of the society; and if the judgment had gone on that footing, the case would not have clashed with Sir J. Wigram's decision; but Lord Langdale made no allusion to the conduct of A. He treated him and C. as equally innocent, and throughout spoke of the omission of A. to give notice to the office, as the neglect by which C. had obtained the advantage.

**1055.** The mortgagee, who does all in his power to complete his title by giving notice, will not be postponed because another, whose security is of later date, has been able to give an earlier notice. Where there was a mortgage of a ship and cargo, and the cargo was transhipped in a distant port, and again mortgaged without notice of the first security; and the second mortgagee gave notice to the consignees of the cargo, and the first did the same later, but as soon as he heard of the transshipment, he was not postponed (*z*). The mortgagee is not bound to adopt means for giving notice which may prove both useless and burthensome, and therefore need not send a notice to meet the master of a ship on a distant and roving voyage wherever he may be, though by doing so his title may be earlier completed (*a*), but possession must be taken at the first opportunity. Priority has however been forfeited by neglect to send notice where there was time, and a reasonable opportunity to communicate with the ship (*b*).

**1056.** The right to freight passes by a mortgage of the ship; and a mortgagee of freight may be postponed to an earlier mortgagee or to a later mortgagee, without notice, of the ship, who first took or claimed from the master possession of the ship and freight (*c*). But if the mortgagee do not actually or

(*z*) *Feltham v. Clark*, 1 De G. & S. 307.

(*a*) *Feltham v. Clark*, *supra*; *Langton v. Horton*, 1 Hare, 549.

(*b*) *Lucas, Exp.*, 3 De G. & J. 113.

(*c*) *Brown v. Tanner*, L. R., 3 Ch. 597; *Wilson v. Wilson*, L. R., 14 Eq. 32.



constructively take possession, the mortgagor or subsequent assignee will take it and will not be liable to account (*d*). The arrival of the ship in the docks is not such a completion of the voyage as will deprive a mortgagee of his right to the freight, if he do not take possession until the happening of that event. It is enough if he take possession before the complete discharge of the cargo, for the right to freight does not accrue until the delivery of the goods, unless there be a stipulation to the contrary (*e*); and so long as they remain on board undelivered, the possession of them is as much within the reason of the rule whilst the ship is in, as whilst she is on her way to, the docks.

**1057.** The mortgagee's right to the freight remains, although, from his security being only upon a part of the ship, he cannot take exclusive possession against or prevent delivery of the cargo by the owner of the remainder; for, though unable personally to take possession, if he give notice to the part owner in possession and require payment of his share of the freight, he will entitle himself to receive such share of all freight accruing and not actually due at the time of the notice (*f*).

The mortgagee's neglect to take such early possession will not, however, give any better right to a subsequent incumbrancer, who had notice of the prior security, when he took his own: in which matter a ship broker, who has advanced money for the ship's use, seems to be in no better plight than any ordinary incumbrancer (*g*).

**1058.** One who acquires a legal title to personalty will hold it free from a trust to which it was subject in the hands of the transferor, if the transferee took it without notice of the trust, even if he did not complete his legal title until after notice. But the assignee of a *chose in action* claiming under an instrument which is available only in equity takes subject to all trusts

(*d*) *Cato v. Irving*, 5 De G. & S. 210; *Brown v. Tanner*, L. R., 3 Ch. 597; *Rusden v. Pope*, L. R., 3 Ex. 269; *Liverpool Marine Co. v. Wilson*, 7 Ch. 507.

(*e*) *John*, 3 W. Rob. 170; *Brown*

*v. Tanner*, *supra*.

(*f*) *Cato v. Irving*, 5 De G. & S. 210; see *Camden v. Anderson*, 5 T. R. 709.

(*g*) *Gibson v. Ingo*, 6 Hare, 112.

and equities which attach to it as against the assignor (*h*). Hence a sub-mortgage will fall with the original mortgage upon which it stands, if the latter be set aside for fraud (*i*). And where a security by the continuing partners of a firm to the retiring partner was assigned by him, it was held, that the assignees took subject to the equitable right of set-off of the former against the latter; and by taking a substituted security after the first, the assignees also become liable to such equities as had arisen at the date of the second security (*k*).

1059. Where the parties are alike innocent and are equally diligent in completing their title, priority in the date of their respective securities will, as in equitable mortgages of realty (1026), give the advantage. This may be illustrated by a case in which a person took a mortgage of a ship at sea, without notice that the master had a power of attorney from the mortgagor to sell his interest in the ship. Upon this power the master in fact acted and sold after the date, but to a person who had no notice of the mortgage. At the end of the return voyage each party took possession; but the right of the mortgagee was upheld, though upon the terms of his making an allowance for the expenses of fitting the ship for the home voyage (*l*). A stipulation which is founded upon the rule, that the freight is liable for the expenses of the voyage in which it is earned (*m*); and one part owner, being entitled as against the others to have it so applied, the mortgagee cannot put his right higher than that of the part owner from whom he derives his title (*n*).

(*h*) *Moore v. Jervis*, 2 Col. 60; *Priddy v. Rose*, 3 Mer. 86; *Cockell v. Taylor*, 15 Beav. 103; *Ord v. White*, 3 Beav. 357; *Dunster v. Lord Glessall*, 3 Ir. Ch. R. 47; *Cole v. Muddle*, 10 Hare, 186.

(*i*) *Cockell v. Taylor*, *supra*; *Barnard v. Hunter*, 2 Jur., N. S. 1213; *Brandon v. Brandon*, 7 De G., M. & G. 365.

(*k*) *Smith v. Parkes*, 16 Beav. 115.

(*l*) *Cato v. Irving*, 5 De G. & S. 210.

(*m*) *Green v. Briggs*, 6 Hare, 395; 17 L. J., N. S. Ch. 323; *Lindsay v. Gibbs*, 26 Beav. 51; 3 De G. & J. 690; 2 Jur., N. S. 1039; 5 Id. 376. The expenses include insurance; at least, as against the assignee of one of the part owners who has not given notice of his interest to the other part owners. Id.

(*n*) *Cato v. Irving*, *supra*; *Alexander v. Simms*, 18 Beav. 80; 5 De G., M. & G. 57.

A puisné incumbrancer upon chattels cannot by taking possession get priority over an earlier incumbrancer, whose security has been duly registered under the Bills of Sale Acts.(o).

*Of Priority under the Maritime Law.*

1060. The precedence of maritime hypothecations and liens is to be determined according to the *lex fori* (p), and the general rule concerning them is that the holders have priority over ordinary incumbrancers, and that if maritime hypothecations be given at different periods of a voyage, and the security be insufficient to discharge them all, the last in date shall be paid first (q); because by the last loan the ship was preserved, and without it the former lenders would have lost their security: and the bondholders' right extends, in the absence of special provision to the contrary, to the whole value of the property saved (r).

For the same reason, if a ship captured by an enemy, and

(o) Allen, Exp., L. R., 15 Eq. 209.

(p) Union, 80 L. J., Ad. 17; Lush. 128. The following is the order of priority pointed out by the French code:—1. The costs of sale and division of the proceeds; 2. Pilotage and other dues; 3. Costs of watching; 4. Rent of warehouses for rigging and stores; 5. Costs of repairs to ship and rigging since the last voyage, and coming into port; 6. Wages of master and crew employed in the last voyage; 7. Advances to the master for the use of the ship during the last voyage, and repayment of the price of goods sold by him for the same purpose; 8. Money due to the vendor, builders and workmen, if the ship have not yet made a voyage; and to the creditors for stores, works, refitment, provisions, armament and equipment, before her departure, if she have already sailed; 9. Money lent on the hull, keel, rigging and stores (i. e. on bottomry), for refitting, victualling, arming and equipping before departure; 10. Premiums for insurance of the hull and appendages of

the ship for the last voyage; 11. Interest by way of damages to freighters, on default of delivery of their goods, or for repayment of losses suffered by the said goods by default of the captain or crew. In case of deficiency, the creditors mentioned under each of these heads come in *pari passu* in proportion to their interests.

One event in which these privileges will become extinct is when, after a voluntary sale (which must be in writing, and may be either when the ship is at sea or in port), the ship has made a voyage under the name and at the risk of the purchaser, without opposition by the vendor's creditors. The voluntary sale during a voyage does not prejudice the vendor's creditors; the ship or its price being still their pledge, with power to impeach the sale for fraud. Code de Commerce, 191—193, 195, 196.

(q) Sydney Cove, Dods. Ad. 13; La Constancia, 2 W. Rob. 404.

(r) Great Pacific, L. R., 2 P. C. 516.

subject to a mortgage, be ransomed, the ransom shall be raised out of the profits notwithstanding the mortgage (*s*). And if money be raised by respondentia on the cargo (146), and be not applied in forwarding it, but the cargo is sent on by the act and at the cost of the owner, the service is in the nature of salvage, and the person who has rendered it will have priority over the holder of the respondentia bond (*t*). It is the fact of salvage, in the case of a security, which gives the priority, and the last incumbrancer will not be privileged against the right of a former lender, unless the loan arose out of the destitute state of the master and his inability to get the necessary supplies for his vessel on the personal credit of himself or his employers (*u*). In like manner, in the case of an incumbrance on real estate, where a creditor had prevented the eviction of the lessee by advancing money to pay off arrears of head rent, it was intimated (*x*), that this rule should not be made an instrument, by which the owner, subject to the mortgage, might get a collusive preference for the salvage creditor. Nor will the creditor derive any advantage over a prior incumbrancer, by reason of an advance for the necessity of the ship beyond the actual extent of the bottomry bond. Therefore, where charterers of a ship, with notice of a mortgage, took a bottomry bond which did not cover the expenses incurred, it was held that they could not, as against the mortgagee, set off the excess against the sum which became due under the charter-party (*y*).

1061. The statutory lien for the salvage of human life (241) has priority over other salvage liens (*z*); and the principle of maritime securities gives to the lien of the mariners for their wages and subsistence (which, to use the expression of Lord Stowell, is a sacred lien, lasting as long as a plank remains),

(*s*) *Hope v. Winter*, 2 Eq. Ca. Abr. 690.

(*t*) *Cleary v. M'Andrew*, 2 Moo. P. C., N. S. 216; 10 Jur., N. S. 477.

(*u*) *Brice v. Williams*, Wallis, R. 325; *Abbott*, 163.

(*x*) *Angell v. Bryan*, 2 Jo. & Lat. 763.

(*y*) *Dobson v. Lyall*, 2 Ph. 323.

(*z*) See 17 & 18 Vict. c. 104, ss. 458, 459; 25 & 26 Vict. c. 63, Parts VIII., IX.; *Coromandel*, Swab. 205.

precedence over bottomry bonds, and other securities (*a*), whether the wages were earned before or after the date of the bond (*b*). And payments for wages made by the direction of the master on account of the ship are entitled to the same priority (*c*). The wages may even be claimed in respect of several voyages, in preference to a bond made during the last of them, where the contract of hiring is continuous, and binds the seaman to remain on board during the whole series of voyages (*d*). In like manner the master, though also a part owner, will have priority over a mortgagee of ship and freight in respect of his wages; and in respect of supplies to the seamen on account of wages and other disbursements properly made for the benefit of the ship (*e*). But although by statute, the master is put upon the same footing as to wages with the mariners, he cannot set up a lien for his own wages, or for money advanced by him for payment of the wages of the mariners in competition with their lien; for being, by an ancient rule of law, personally liable to them for their wages, whether the security be sufficient or not, he cannot take any thing from it to their detriment (*f*).

**1062.** Neither can the master claim in priority to materialmen, where he is part owner, or has made himself personally liable for the necessities supplied (*g*); or to the bondholder, where, as is usually the case, the master has pledged his own credit for the loan (*h*), besides the security of the ship: though it will be otherwise where his personal undertaking is only that he is the master, and in that character has a right to hypothecate the ship (*i*). But the rule will not be extended to cases

(*a*) Sydney Cove, Dods. Ad. 13; Madonna d'Idra, Dods. Ad. 37; William H. Safford, Lush. 69.

(*b*) Union, 30 L. J., Ad. 17; Lush. 128.

(*c*) William H. Safford, Lush. 69. But not payments by a person merely claiming as creditor for money alleged to have been partly laid out in wages. (New Eagle, 2 W. Rob. 441.)

(*d*) Louisa Bertha, 14 Jur. 1006.

(*e*) Mary Ann, L. R., 1 Ad. 8; Feronia, 2 Id. 65.

(*f*) Salacia, Lush. 545; 9 Jur., N. S. 27; 32 L. J., Ad. 41.

(*g*) Jenny Lind, L. R., 3 A. & E. 529.

(*h*) William, Swabey, 346; 31 L. T. 345; Jonathan Goodhue, Swabey, 524.

(*i*) Salacia, supra.

in which the bondholder, for whose protection alone it is made, will not be injured by giving preference to the claim of the master—as where, by marshalling the securities, the claim of the bondholder can be thrown upon the cargo, leaving the ship and freight open to the master (*k*).

**1063.** The claim for wages and other burthens, which form a lien upon the ship when she is brought into the yard of a shipwright for repairs, will be preferred to the shipwright's common law lien, notwithstanding the possession upon which that lien is founded (293), it being presumed that he received the ship subject to its existing obligations; and the preferential claim will extend to the usual allowance to foreign mariners for their return to their own country, but not to any continuing claim for wages or necessities supplied after the vessel has come into the hands of the shipwright (*l*). Nor can claims for necessities, or other liabilities which are not perfected at the time of the shipwright's possession, come into competition with his lien (*m*).

**1064.** The right of the creditor by mortgage or bottomry may be overridden, by the lien of the successful suitor, for damage done after the date of the mortgage or bond (242); for the creditor for damage may be wholly without remedy, except against the ship, but the other may exercise a discretion as to advancing: and in the case of the bottomry creditor, the risk is covered by the premium. But a bottomry bond, *bonâ fide* granted for the repairs of a vessel after damage done, will not give way to the earlier lien for damage; the creditor under which himself derives a benefit from the repairs (*n*).

**1065.** A mortgagee of the ship will have priority over persons who have lent money for repairs or other necessities of the ship, but who, not being in possession, cannot establish

(*k*) Edward Oliver, L. R., 1 Ad. 379;  
Daring, 2 Id. 260; Eugenie, 4 Id. 123.  
(*l*) Gustaf, Lush. 506.

(*m*) Id.  
(*n*) Aline, 1 W. Rob. 111.

a lien (236), even though the mortgagee had notice that money had been so laid out for the use of the ship; and the rights against the ship and the proceeds when it has been sold are the same (*o*),



## CHAPTER VII. PART 4.—OF PRIORITY BY STATUTE.

1066. *Under the Land Registration Acts.*

1077. *Under the Ship Registry Acts.*

1082. *Under the Judgment Acts.*

1105. *Under the Bankruptcy and other Acts.*

1066. Under the Middlesex, Yorkshire, Hull and Irish Registration Acts (45), registered instruments have priority over such as are of earlier date, but unregistered, if the owner of the later registered security had no notice of that over which he claims priority (*p*).

But although, at law, an unregistered instrument was held to be fraudulent and void, according to the words of the statutes, as against a subsequent purchaser for valuable consideration, though he took with notice of the unregistered security (*q*), it is held in equity (*r*), that the effect of these acts is neither to vitiate an unregistered instrument (47), nor to give an instrument any greater force by virtue of registration than it originally had, as against an earlier unregistered instrument, but only to avoid the latter as against the former (*s*)—thus letting in the doctrine of notice. And this is, because according to the equitable construction, the intention was to give notice to persons who for want of it might be imposed upon by a

(*o*) *Watkinson v. Bernadiston*, 2 P. W. 367; *New Eagle*, 2 W. Rob. 441; see *Neptune*, 3 Knapp, 94; *Scio*, L. R., 1 Ad. 353.

(*p*) *Wight's Mortgage Trusts*, Re, L. R., 16 Eq. 41; *Credland v. Potter*, Id. 18 Eq. 350; 10 Ch. 8.

(*q*) *Doe d. Robinson v. Allsop*, 5 B. & Ald. 142.

(*r*) *Jones v. Gibbons*, 9 Ves. 411.

(*s*) *Wrightson v. Hudson*, 2 Eq. Ca. Abr. 609. As to the effect of the Indian Registration Act, 1866, see *Macpherson on the Law of Mortgage in Bengal and the North West Provinces*, Ch. 5; *Hicks v. Powell*, L. R., 4 Ch. 741.

prior security, and not to shelter those who had it already (*t*). For a person who takes and registers a conveyance, with a view to defeat the charge of another, takes with an ill conscience, and his purchase shall never be set up in equity.

From which consideration it follows,—

1st. That a legal mortgagee without notice, and duly registered, shall be preferred to an equitable mortgagee, also duly registered, and earlier in time than the other (*u*); and that a prior legal mortgagee, duly registered, lending a further sum without actual notice of a *puisné* incumbrance (*x*), or an equitable mortgagee in like manner getting in the legal estate (*y*), may tack their respective securities, although the *mesne* incumbrance be duly registered—for the registration working no notice, the legal estate prevails according to the doctrine of tacking (993). But under the Irish act, priority is according to the time of registration (45), and the doctrine of tacking, by which the prior legal deed draws to it the subsequent unregistered instrument, to the prejudice of the *mesne* registered instrument, is controlled (*z*). Under the Irish act, therefore, an instrument though equitable only, and subsequent in date and execution, becomes effectual by registration against all other incumbrancers (*a*), whether legal or equitable; but this is by the mere force of the words of the act, and does not imply that registration amounts to notice under the Irish, any more than under the English acts (*b*). And it is only a deed above exception, and untainted with fraud, which will acquire priority by registration (*c*).

(*t*) *Blades v. Blades*, 1 Eq. Ca. Abr. 358; *Ford v. White*, 16 Beav. 120; *Johnson v. Holdsworth*, 1 Sim., N. S. 106; *Bushell v. Bushell*, 1 Sch. & Lef. 90; *Lord Forbes v. Deniston*, 4 Bro. P. C. 189; *Cheval v. Nichols*, Str. 664.

(*u*) *Morecock v. Dickens*, Ambl. 678.

(*x*) *Bedford v. Blackhouse*, 2 Eq. Ca. Abr. 615.

(*y*) *Cator v. Cooley*, 1 Cox, 182.

(*z*) *Bushell v. Bushell*, 1 Sch. & Lef. 90; *Latouche v. Dunsany*, id. 137.

See *Carlisle v. Whaley*, L. R., 2 E. & I. App. 391.

(*a*) *Eyre v. Dolphin*, 2 Ba. & Be. 290—300; *Thompson v. Simpson*, 1 Dru. & War. 486; *McNeill v. Cahill*, 2 Bligh, 228.

(*b*) *Bushell v. Bushell*, *supra*; *Underwood v. Lord Courtown*, 2 Sch. & Lef. 41; *Pentland v. Stokes*, 2 Ba. & Be. 75.

(*c*) *Underwood v. Lord Courtown*, *supra*.



2nd. That a subsequent incumbrancer, taking with notice of a prior security, shall not, although that security be unregistered, gain a preference over it in equity by registering his own (*d*); because the defect arising from notice cannot be cured by the registration. And this doctrine extends to the Irish act (*e*); and by analogy to it, it has been held (*f*), that a lessor proceeding in ejectment, under 8 Geo. 1, c. 2 (Ireland), must serve the mortgagee, of whose security he has notice, with the ejectment, although the mortgage be unregistered.

**1067.** But the subsequent incumbrancer will not be affected, unless he had notice when he took his security (*g*); for his registering, in consequence of notice received afterwards, is no more than happens when an incumbrancer without notice protects himself by getting in an outstanding term, upon receiving notice of the *mesne* charge. It has been said that the notice must be so clear and undoubted, that the registration of another deed in prejudice of the title would amount to fraud; no suspicion of notice being sufficient to induce the court to break in upon the statute (*h*). Suspicion of notice, however, is not notice; but clear constructive notice, such as arises from the agent to the principal, is now held to bind the later incumbrancer; though no question of fraud or conscience arises out of such notice (*i*).

(*d*) *Blades v. Blades*, 1 Eq. Ca. Abr. 358; *Cheval v. Nichols*, Str. 664; *Sheldon v. Cox*, Ambl. 624; 2 Eden, 224; *Le Neve v. Le Neve*, 3 Atk. 646; *Bushell v. Bushell*, 1 Sch. & Lef. 90; *Lord Forbes v. Deniston*, 4 Bro. P. C. 189; *Johnson v. Holdsworth*, 1 Sim. N. S. 106; *Tunstall v. Trappes*, 3 Sim. 301.

(*e*) *Agra Bank v. Barry*, L. R., 7 E. & I. App. 135.

(*f*) *Biddulph v. St. John*, 2 Sch. & Lef. 521.

(*g*) *Elsey v. Lutyens*, 8 Hare, 159; and see *Essex v. Baugh*, 1 Y. & C. C. 620.

(*h*) *Hine v. Dodd*, 2 Atk. 275; *Jol-*

*land v. Stainbridge*, 3 Ves. 478; *Wyatt v. Barwell*, 19 Ves. 435; see *Natal Land, &c. Co. v. Good*, under the law of Natal, L. R., 2 P. C. 121.

(*i*) *Marjoribanks v. Hovenden*, Dru. 11; *Rolland v. Hart*, L. R., 6 Ch. 678; and see *Leuchan v. McCabe*, 2 Ir. Eq. R. 342; and *Wormald v. Maitland*, 35 L. J., Ch. 69, dissented from in *Agra Bank v. Barry*, *supra*. In *Popham v. Baldwin*, 2 Jo. 320, notice of a tenancy, and in *Wallace v. Donegal*, 1 Dr. & Wal. 461, *lis pendens*, were held not to be such notice as would avoid the effect of the Registry Act, according to *Wyatt v. Barwell*.

And a purchaser or mortgagee is not bound to make inquiries with a view to the discovery of unregistered instruments (*k*).

**1068.** An unregistered assignment may be sheltered under the earlier registered deed, and have priority over an unregistered deed of earlier date than either of them (*l*); but a later registered deed will not, it seems, protect that which is earlier and unregistered, supposing it to be otherwise good. Therefore where an unregistered lease was mortgaged, and afterwards sold, and the mortgage and purchase deeds were both duly registered, the registry was held to be insufficient (*m*); because it is required that the original deed under which the party claims with the witnesses' names be registered and that the original be produced to the proper officer.

Under the Irish act, also, the subsequent registered deed of a person having in fact no interest, but having, by the neglect of the real owners, an appearance of a legal title, was allowed precedence (*n*) over an earlier unregistered deed;—the circumstances being, that a husband, party to a marriage-settlement by which his wife conveyed her leaseholds to trustees, upon trust for herself and her children, with a trust for the husband to receive the rents during his life, made a lease after the marriage, to which the trustees were postponed; on the ground, that having permitted him by their neglect to register, to retain the appearance of a marital right, neither they, nor those claiming under them, could set up their deed against the persons deluded by this appearance of right.

In the case last cited arose the question, whether it be necessary for the gaining of priority by registration, that both the earlier and later deeds should be the deeds of the same grantor; and on appeal to the House of Lords from Ireland, it was the opinion of the Judges, with which the House agreed, that no such restriction was intended. And it was said, that the mis-

(*k*) *Agra Bank v. Barry*, L. R., 7 E. & I. App. 135, per Lord Selborne.

(*l*) *Warburton v. Loveland*, 6 Bligh, N. R. 1; 2 Dow & Clarke, 480.

(*m*) *Honeycomb v. Waldron*, Str.

1064; *Jack v. Armstrong*, 1 Huds. & Bro. 727.

(*n*) *Warburton v. Loveland*, 6 Bligh, N. R. 1.

chief to the subsequent purchaser, which the acts were meant to prevent, was the same, whether the secret conveyance or charge arose from the deed of his immediate grantor, or of a former owner of the estate. But a different opinion was some years earlier expressed (*o*) by the Court of King's Bench in Ireland, which considered, that the policy of the act was confined to the dealings of one party, and to the limits of one life; and that the devisee or heir of the seller of an estate where the latter had conveyed by an unregistered deed, could not, by a registered deed, vest a good title in a third person; for there the seller, having already parted with all his interest, the grantor of the registered deed had nothing to convey. And on that principle they decided, that a registered assignment of property, seized and sold by the sheriff, was of no force against an earlier unregistered conveyance by the debtor. Yet it was held to be clear, that if the second deed had been made by the same grantor as the first, it should have prevailed after registration; for, by the very terms of the act, the other being unregistered, would, as against it, have been fraudulent and void.

**1069.** The registration of an assignment of a sum of money, charged upon land in a register county, is not within the act, and will confer no priority (*p*).

**1070.** An appointment made in exercise of a power will be postponed to a subsequent incumbrance which was registered earlier, whether, it seems, the deed which created the power were registered or not (*q*).

**1071.** The registration protects the equitable title of the mortgagor, as well as the legal title of the mortgagee; and prevents the lessee of the latter from claiming a title adversely to the former (*r*).

(*o*) *Fury v. Smith*, 1 Huds. & Bro. 63.

735; see *Jack v. Armstrong*, id. 727;  
*Honeycomb v. Waldron*, 2 Stra. 1064.

(*q*) *Scrafton v. Quincey*, 2 Ves. 413.

(*r*) *Ball v. Lord Riversdale*, Beat.

(*p*) *Malcolm v. Charlesworth*, 1 Keen, 550.

**1072.** No priority will be gained by an informal registration (*s*). For instance, if the grantor have executed, and the grantee have done so afterwards, in the presence of other witnesses, by one of whom only the memorial is attested. The act makes one of the witnesses to the deed a necessary witness to the memorial; the grantee's execution is, however, not the execution of the deed, but may altogether be dispensed with. The grantor's is the real execution, and one of his witnesses must attest the memorial.

**1073.** The East Riding Registration Act provides (*t*), that every deed or conveyance shall be fraudulent and void against any subsequent purchaser, or mortgagee for valuable consideration, unless a memorial be registered before the registration of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim; and that every devise by will shall be fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial be registered within six months after the death within the kingdom of Great Britain, or within three years after the death beyond the seas, of the devisor; or where the will is contested, or there is other inevitable difficulty in registration within six months after the attainment of the will or a probate thereof, or the removal of any impediment to registration, if the impediment were registered within the like periods after the death of the devisor. Similar provisions with some variations exist in the other acts (*u*). It was held under the East Riding Act that a will, not registered within the period allowed by the act, was inoperative (*v*) against a subsequent registered mortgage by the heir at law, though the omission to register the will within the statutory period did not arise from neglect, but from ignorance of its existence, and though there was no "impediment" which could be registered. But the mortgage was made a year after the discovery of the will,

(*s*) *Jack v. Armstrong*, 1 Huds. & Bro. 727.      5 Ann. c. 18; 6 Ann. c. 2; 8 Geo. 2, c. 6.

(*t*) 6 Ann. c. 35, ss. 1, 14, 15.      (*v*) *Chadwick v. Turner*, 11 Jur., N. S. 333; 34 Beav. 634; L. R., 1 Ch.

(*u*) 7 Ann. c. 20; 2 & 3 Ann. c. 4; 310.

which was not registered until more than two years after that period; so that with due diligence the will might have been registered long before the execution of the mortgage; and it may be doubted whether, if this had been done, a court of equity would have given the priority to the mortgagee, for want of that exact compliance with the statute on the part of the devisee, which circumstances beyond his control had rendered impossible.

It has, however, since been enacted that, where the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf, an assurance of such land to a purchaser or mortgagee by the devisee or by some one deriving title under him, shall, if registered before, take precedence of and prevail over any assurance from the testator's heir at law (*x*).

**1074.** Under the provision of the Middlesex Registration Act (*y*), which requires that every memorial shall be numbered, and that the day of the month and year, and the hour or time of the day when every memorial shall be registered, shall be entered in the margin of the register book and of the memorial, and that (*z*) every deed or conveyance shall be fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial thereof be registered before the registration of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim, documents which are shown by the entries to have been registered on the same day, and at the same hour, will be assumed to have been duly entered in the order in which they were received by the registrar, as indicated by the numbers attached to them respectively (*a*), and will be entitled to priority accordingly.

**1075.** The Land Transfer Act, 1875, provides that, subject to any entry to the contrary on the register, registered charges

(*x*) Vendor and Purchaser Act,  
1874, c. 78, s. 8.

(*y*) 7 Ann. c. 20, s. 6.

(*z*) Sect. 1.

(*a*) *Neve v. Pennell*, 2 H. & M. 170;  
33 L. J., Ch. 19.

on the same land shall as between themselves rank according to the order in which they are entered on the register, and not according to the order in which they are created (*b*).

**1076.** If, in any proceeding under the Transfer of Land Act, 1862, any question shall arise respecting the priority of any charges or incumbrances, claims or interests, it shall be competent to the registrar to report the same to a judge of the Court of Chancery, who shall have power to summon all parties entitled to attend him, either in court or at chambers, and to decide all questions touching priority, and relative to the rights of parties; as fully as if they were parties to a suit instituted for the purpose (*c*).

*Of Priority under the Ship Registry Acts.*

**1077.** The Merchant Shipping Act, 1854, directs (*d*), that if there be more than one mortgage registered of the same ship, or share therein, the mortgagees shall, notwithstanding any express, implied or constructive notice, be entitled in priority, one over the other, according to the date at which each instrument is recorded in the register books, and not according to the date of each instrument itself (**72**).

No registered mortgage of any ship, or share therein, shall be affected by any act of bankruptcy, committed by the mortgagor, after the date of the record of such mortgage, notwithstanding such mortgagor, at the time of his becoming bankrupt, may have in his possession and disposition, and be the reputed owner of such ship or share thereof; and such mortgage shall be preferred to any right, claim or interest in such ship, or any share thereof, which may belong to the assignees of such bankrupt (*e*).

**1078.** The same act contains the following directions (*f*), concerning the priority of securities made under the certificates of mortgage established by the act (**71**).

(*b*) 38 & 39 Vict. c. 87, s. 28, rule  
20, Dec. 1875.

(*c*) 25 & 26 Vict. c. 53, s. 92.

(*d*) Sect. 69.

(*e*) Id. s. 72.

(*f*) Id. s. 80.

Whenever the certificate specifies the places, and limits the time (not exceeding twelve months), within which the power of mortgaging is to be exercised, no mortgage, *bond fide* made to a mortgagee without notice, shall be impeached, by reason of the bankruptcy or insolvency of the person by whom the power was given.

Every mortgage, which is registered on the certificate, shall have priority over all mortgages of the same ship, or share, created subsequently to the date of entry of the certificate in the register book; and if there be more mortgages than one, so endorsed, the respective mortgagees claiming thereunder shall, notwithstanding any express, implied or constructive notice, be entitled one before the other, according to the date at which a record of each instrument is endorsed on the certificate, and not according to the date of the instrument creating the mortgage.

And subject to these provisions, and to the rules laid down as to the exercise of the power given by the certificate, every mortgagee whose mortgage is registered on the certificate, has the same rights and powers, and is subject to the same liabilities, as he would have had, and been subject to, if his mortgage had been registered in the register book instead of on the certificate (*g*).

1079. It has been held that a registered mortgagee cannot tack an unregistered further charge against a third registered mortgage to other mortgagees, where the unregistered charge was not exclusively for the first mortgagee's benefit: in which case it must be treated as an independent security requiring registration. The court abstained from expressing an opinion as to the right to tack, if the further charge had belonged exclusively to the first mortgagee (*h*).

1080. The provision (*i*) that the mortgagee shall not by reason of the mortgage be deemed to be the owner of the ship, except so far as may be necessary for making it available as a

(*g*) Id. s. 80, (4), (5), (6).

& G. 585.

(*h*) *Parr v. Applebee*, 7 De G., M.

(*i*) Sect. 70.

security, makes the registered mortgagee the owner, so far as is necessary for that purpose; and therefore protects him against a sale of the ship by an execution creditor (*k*).

**1081.** No registered mortgage of any ship or share therein shall be affected by any act of bankruptcy committed by the mortgagor after the date of the record of such mortgage; notwithstanding such mortgagor, at the time of his becoming bankrupt, may have in his possession and disposition and be the reputed owner of such ship or share thereof; and such mortgage shall be preferred to any right, claim or interest in such ship or any share thereof which may belong to the bankruptcy trustee of such bankrupt (*l*).

*Of Priority under the Judgment Acts.*

**1082.** Judgments affect the property of the debtor from the time when the sheriff has made his return to the registered writ of execution; and the priorities of judgment creditors are determined by the priority of the date at which their respective writs of execution were delivered to the sheriff (*m*).

**1083.** The interest of the judgment creditor, whether he be with or without notice, in the property of his debtor is subject to every liability under which the debtor held it; if the debtor have a legal estate subject to an equity, the judgment will be a charge upon the estate, subject to the same equity; if an equitable estate, the judgment will affect the equitable interest (*n*). A judgment creditor has therefore no priority by force of his judgment over persons who have prior equitable interests in the same estate (*o*); whether he claim (in an ordinary case of trust) against the estate of the *cestui que trust* under a judg-

(*k*) *Dickinson v. Kitchen*; *Kitchen v. Irving*, 8 E. & B. 789; 5 Jur., N. S. 118. As to the original object of sect. 70, see *Rusden v. Pope*, L. R., 3 Ex. 272, per Martin, B.

(*l*) Sect. 72.

(*m*) 27 & 28 Vict. c. 112, ss. 1, 3; *Guest v. Cowbridge Railway Co.*, L. R., 6 Eq. 619.

(*n*) *Langton v. Horton*, 1 Hare, 560; *Hughes v. Williams*, 3 Mac. & G. 683; *Whitworth v. Gaugain*, 1 Ph. 728; *Abbott v. Stratten*, 3 Jo. & Lat. 603; *Ames v. Trustees of the Birkenhead Docks*, 20 Beav. 332; 1 Jur., N. S. 529.

(*o*) *Whitworth v. Gaugain*, 3 Hare, 427.



ment against the trustee (*p*), or against such an equitable interest, as that of a purchaser for value, who has paid his purchase-money without getting a conveyance (*q*). As to cases of the latter class, the rule was early laid down (*r*), that if A. take a mortgage by a defective conveyance, and B. lend money to A. on bond, and obtain judgment on the bond, against the mortgagor, and so extend the land, a Court of Equity will relieve A. against the judgment creditor; and speaking of such a case (where the land had descended), Lord Nottingham says (*s*), "I decreed the heir to make a conveyance to the mortgagee, according to his father's covenant for further assurance, and that he should hold till redemption, discharged of those judgments; wherein I did not rely upon the legal notice of his pendens, but held the heir in this case to be a trustee of the land descended, which was charged with the equity of the mortgage, but could not be encumbered by the heir; for a purchaser without notice of a trust may be free, but an incumbrance is not like a sale."

And where tenant for life and tenant in tail joined in conveying to trustees, in trust to sell and divide the purchase-money, it was held (*t*) that judgments entered up against the tenant for life after this conveyance, did not bind the estate; for that would have affected the son's equitable right to the performance of the trusts of the deed. And it was said, that from the time when a person, not having judgments against him, entered into binding contracts to sell his estates to purchasers, the latter had a right to have the legal estate conveyed; and if the vendor had subsequently confessed a judgment, that judgment never could have impeded the progress of the legal estate to them. The like doctrine prevails where the judgment creditor claims after an equitable charge for payment of debts, or any other equitable interests (*u*).

(*p*) *Newlands v. Paynter*, 4 Myl. & Cr. 408.

(*q*) *Finch v. Earl of Winchelsea*, 1 P. Wms. 278; 3 Hare, 427.

(*r*) *Gilb. Forum Romanum*, 228.

(*s*) *Burgh v. Francis*, 3 Sw. 536, n.;

and see *Prior v. Penpraze*, 4 Price, 99.

(*t*) *Lodge v. Lyseley*, 4 Sim. 70.

(*u*) 3 Hare, 427; 1 Ph. 730; and see *Brearcliff v. Dorrington*, 4 De G. & S. 122.

**1084.** By the statute 13 Eliz. c. 4, all lands and hereditaments which any such treasurer, receiver or other accountant to the Crown as is mentioned in the statute shall have within the time while he, she or they shall remain accountable, shall be liable for the payment and satisfaction of and be put in execution for arrears and debts due to the Crown, in as large and beneficial a manner as if the person accountable had, the day he first became an officer or accountant, stood bound by writing obligatory, having the effect of a statute staple (157) to the Crown, for the true answering and payment of the said arrears and debts.

The lands of an accountant to the Crown are bound by this statute to answer the debt of the Crown, though the accountant be not at the time an actual debtor to the Crown, and though no extent be issued against him for several years later (*x*). The right thus enjoyed by the Crown is now subject to the provision of the Crown Suits Act, 1865 (*y*), under which future Crown debts do not affect land as against *bonâ fide* purchasers for valuable consideration, or mortgagees with or without notice, until a writ of execution be issued and registered before the execution of the conveyance or mortgage to the purchaser or mortgagee (185); but this provision does not (*z*) take away or abridge any prerogative or right of the Crown in respect of priority or otherwise, over or against the creditors of any debtor or accountant to the Crown; and save as expressly provided in the part of the act referred to, every prerogative or right of the Crown, as against the land or creditors of any debtor or accountant to the Crown, remains as if that part of the act had not been enacted.

The Crown claiming under an extent is, however, like other judgment creditors, subject to prior equities and to such liabi-

(*x*) *Nicholls v. How*, 2 Vern. 389; see *Co. Litt.* 209, a, n. 1. But if on sale under an extent, the purchaser obtain an order for payment of his purchase-money into the exchequer, and the money is invested with the consent of the Crown on the motion of the purchaser, and accumulated until it is more than enough to satisfy the Crown

debt, the Crown not being liable in such a case to bear any loss, will not share in the surplus which remains after payment of principal, interest and costs. (*The King v. De la Motte*, 2 H. & N. 589.)

(*y*) 28 & 29 Vict. c. 104, ss. 48, 49.

(*z*) Sect. 51.

lities as the debtor has lawfully created (*a*), and it makes no difference if after the Crown debt has accrued, a new lease be taken in the name of the Crown debtor, because the new lease remains subject to the same equities (*b*) (455). But it was said there would have been a difficulty if the legal estate had been in the Crown, against which there would then be no equity (*c*).

The prior security will not prevail against the Crown, if it were made in favour of a person in whom it was a breach of duty to the Crown to take it; as where it was taken by a receiver-general from a person immediately responsible to him in respect of monies due to the Crown. And it seems that in such a case it would be the same if the mortgage were legal (*d*).

**1085.** And so persons claiming under a writ of sequestration issued by the court, will have priority over a mortgagee who takes his security knowing that it was made to avoid the effect of the sequestration (*e*).

**1086.** An equitable mortgagee has the same protection as any other *cestui que trust* against the subsequent judgment creditor, because a judgment creditor takes the property of his debtor subject to all the equities which affect it, including the rights of an equitable mortgagee; which are absolute and complete, as between himself and the mortgagor, being only imperfect as between the mortgagee and the judgment creditor, in respect of their liability to be defeated by a fraudulent dealing with the legal estate, to which all equitable interests are alike subject; and even if the right of the judgment creditor could be taken to be founded on contract, a contract to give that which did not belong to the debtor cannot be implied (*f*).

(*a*) *Casberd v. A.-G.*, Dan. 288; 6 732.

Price, 411; *The King v. Humphrey*,  
M'Clel. & Younge, 173; *The King v.*  
Lee, 6 Price, 369; *Giles v. Grover*,  
6 Bligh, N. S. 292.

(*b*) *Fector v. Philpott*, 12 Pr. 197.

(*c*) *Casberd v. A.-G.*, supra, 1 Ph.

(*d*) *Broughton v. Davies*, 1 Pr. 216.

(*e*) *Ward v. Booth*, L. R., 14 Eq.  
195; see *Empringham v. Short*, 3 Hare,  
461.

(*f*) *Whitworth v. Gangain*, 1 Ph.  
728; Cr. & Ph. 325; 3 Hare, 416; and

**1087.** The same rule is applicable to the rights of a judgment creditor, who, under the Irish Act, 13 & 14 Vict. c. 29 (191), has filed and registered an affidavit, by virtue of which he has the same remedies as if a conveyance subject to redemption had been made and registered, *i. e.* according to the true construction of the act, a mortgage of the debtor's remaining beneficial interest; and he obtains no additional priority by virtue of the peculiar terms of the Irish Registry Act (*g*) (1066).

**1088.** Where the equitable incumbrancer of chattels has completed his title by giving notice (1047), he also will have priority over the subsequent judgment creditor without notice, who has sued out his *fi. fa.*, just as in the case of real estate, he has priority over the *elegit*. It has therefore been held (*h*), that a judgment creditor had no right to take in execution a ship and cargo, as against prior equitable mortgagees (under a security made whilst the ship was at sea), who had sent notice of the assignment to the master, and had received immediate possession of the property from him upon the termination of the voyage.

But it has been intimated (*i*), that if the prior equitable title be incomplete, the claim of a subsequent judgment creditor, as well as that of a subsequent equitable purchaser, might prevail.

**1089.** Where after judgment was entered up, the debtor mortgaged his real estate under a power of appointment before 1 & 2 Vict. c. 110, the judgment was defeated; because the mortgagee took under the instrument creating the power, and his estate was never touched by the judgment (*j*). But under the statute (s. 13) a judgment charges all lands over which the

see *Williams v. Craddock*, 4 Sim. 313; *Abbott v. Stratten*, 3 J. & L. 603. So with respect to incorporeal property, as tolls. (*Ames v. Trustees of Birkenhead Docks*, 20 Beav. 332; 1 Jur., N. S. 529.)

(*g*) *Eyre v. M'Dowell*, 9 H. L. C. 619.

(*h*) *Langton v. Horton*, 1 Hare, 549.

(*i*) 1 Hare, 560.

(*j*) *Doe d. Wigan v. Jones*, 10 Barn. & Cr. 459.

debtor has any disposing power, which he may exercise for his own benefit without the assent of any other.

**1090.** As to the nature of the interest which the judgment creditor takes in the incumbered property of his debtor, there was a difference of opinion between the Court of Chancery and the majority of the Court of Queen's Bench; which held (*h*) that a judgment creditor, who having obtained a charging order upon stock, had given notice to the trustees of the stock, was entitled to priority over a previous mortgagee of the same stock, who had given no notice of his charge.

But upon the ground that the property from the time of the assignment, though without notice, is held in trust for the assignee as between him and the assignor, it is now considered that neither the assignor nor the trustee can resist the owner's claim, on the ground of want of notice; and that the compulsory charge intended by the statute must be presumed to be a lawful charge, and therefore a charge only upon such interest as the debtor really possessed (*l*):

It has been also observed, that the ground for giving a second mortgagee priority over the first, by reason of his having been led to take an incumbered as an unincumbered property, is not applicable to a judgment creditor; who has not been deceived as to the condition of the title, and as to whom the judgment debtor has been guilty of no deceit in suffering judgment.

A judgment creditor, therefore, cannot gain priority by virtue of a charging order, whether *nisi* or absolute, over the equitable mortgagee of a chose in action who has given no notice, whether the mortgage were earlier or later than the judgment, but before the charging order; not only because the creditor gets nothing but what the debtor can dispose of, but because

(*h*) *Watts v. Porter*, 3 El. & Bl. 743; 2 C. L. R. 1553; 1 Jur., N. S. 133; per Lord Campbell, C. J., and Wightman and Crompton, JJ.

(*l*) See *Beavan v. Lord Oxford*, 6 De G., M. & G. 507; 2 Jur., N. S. 121; and see the judgment of Romilly, M. R., in *Kinderley v. Jervis*, 2 Jur.,

N. S. 603; 22 Beav. 1; *Brearclyff v. Dorrington*, 4 De G. & S. 122; *Dunster v. Lord Glengall*, 3 Ir. Ch. R. 47; *Benham v. Keane*, 1 J. & H. 685; 3 De G., F. & J. 318; 8 Jur., N. S. 604; *Pickering v. Ilfracombe Railway Co.*, L. R., 3 C. P. 235; *Robinson v. Nesbitt*, id. 264.

before the date of the order the debtor had ceased to be the sole owner of the fund (*k*).

**1091.** The order *nisi* operates as a charge subject to cause being shown against making it absolute, and it cannot be defeated by any subsequent proceeding. The priority of a creditor who has obtained judgment against the executor of his debtor, and a charging order *nisi*, will therefore not be affected by a decree for the administration of the debtor's estate before the charging order was made absolute (*l*). And as a charging order has no greater effect than a charge executed by the judgment debtor (**167**), a charging order on a judgment by default for a debt which was incapable of being enforced will be inoperative (*m*).

**1092.** A judgment creditor is not a purchaser within the act 27 Elizabeth (**327**), for avoiding fraudulent conveyances against subsequent purchasers, and he has therefore no priority over a voluntary settlement of earlier date than his judgment (*n*). For under the old law the judgment creditor has no right to the land, having neither *jus in re*, nor *jus ad rem* (*o*); and under the act of Victoria, he has only a charge upon the property or interest which remains in the debtor (**1086**), whose right to defeat the voluntary deed, by a conveyance for valuable consideration, is not a disposing power within the act, the words "disposing power" (*p*) being there construed in their ordinary meaning. Neither has the judgment creditor of the heir, whether his judgment were entered up before or after the death of the ancestor, priority in respect of the descended estate over the simple contract debts of the ancestor; because the judgment operates only upon the beneficial interest of the heir, which is subject to the

(*k*) *Scott v. Lord Hastings*, 4 K. & J. 633; 5 Jur., N. S. 240; *Warburton v. Hill, Kay*, 470.

(*l*) *Haly v. Barry*, L. R., 3 Ch. 452.

(*m*) *Onslow's Trusts, Re*, L. R., 20 Eq. 677.

(*n*) *Beavan v. Lord Oxford*, 2 Jur.,

N. S. 121; 6 De G., M. & G. 507; *Dolphin v. Aylward*, L. R., 4 H. L. 486.

(*o*) *Brace v. Duchess of Marlborough*, 2 P. Wms. 492.

(*p*) See sects. 11, 13.

payment of the ancestor's debts (*q*). The like rule of course applies to the judgment creditor of the devisee and the creditors of the devisor. The judgment creditor also is not considered as a purchaser by virtue of the 13th sect. of the act, which gives him the remedies of an equitable mortgagee.

A judgment creditor, whose title has been completed (768) after the date but before the execution by any of the creditors of a deed of trust for creditors, will have priority over creditors by whom it is subsequently executed (*r*).

1093. The proviso in the 13th sect. of 1 & 2 Vict. c. 110, did not affect the existence of the charge of the judgment creditor, but only suspended his remedy for a year (*s*). The charge was therefore held not to have been overridden by the rights of the debtor's assignees (where the debtor had become insolvent within a year from the entering up of the judgment) by the effect of the now repealed Insolvent Act, 7 & 8 Vict. c. 96, s. 21; which provided that, after the filing of the insolvent's petition for protection, no person should avail himself of any *execution* upon a judgment obtained on a warrant of attorney or *cognovit*, or any bill of sale, but that any person to whom money was due in respect of any such warrant of attorney or *cognovit*, or of such bill of sale, might be a creditor for the same under the act (*t*).

1094. The stipend of the curate of a benefice under seques-

(*q*) *Kinderley v. Jervis*, 22 Beav. 1; see 3 & 4 Will. 4, c. 104. But lands *bonâ fide* aliened (though only by deposit of deeds) by the heir before action brought are not liable, by the statute of fraudulent devises (3 W. & M. c. 14, s. 5) to execution by the creditors of the ancestor, the heir only being bound. (*Spackman v. Timbrell*, 8 Sim. 253; *Richardson v. Horton*, 7 Beav. 112; *Baine, Exp.*, 1 M., D. & De G. 492.) That the equitable mortgagee of the devisee, whether by actual conveyance or by deposit of deeds with a memorandum, will have priority over

simple contract debts of the devisor, in respect of which judgment has not been obtained, see *British Mutual Investment Co. v. Smart*, L. R., 10 Ch. 567.

(*r*) *Langhorne v. Harland*, 4 W. R. 696.

(*s*) *Boyle, Exp.*, 3 De G., M. & G. 515; 17 Jur. 979.

(*t*) *Robinson v. Hedge*, 17 Sim. 183; 14 Jur. 784. As to the effect of this section on a bill of sale, see *Congreve v. Evetts*, 2 C. L. R. 1253; 10 Exch. 298.

tration appointed by the bishop under the Sequestration Act, 1871, has priority over all sums payable by virtue of the judgment or bankruptcy under which the sequestration issues, but not over liabilities in respect of charges on the benefice (*u*). And the judgment creditor will not rank before incumbrancers earlier in date than the sequestration, but will be postponed to a security affecting the benefice, and obtained between the dates of the judgment and of the sequestration (*v*).

**1095.** A judgment creditor who has taken out execution, loses his priority on the return of the writ over so much of the estate as is not sold under the execution, because the writ has no more effect after its return, and the creditor's right to sue out another writ does not continue to him his former priority (*x*).

**1096.** Where a judgment creditor received more than the sum for which judgment was entered up, a court of law ordered (*y*) satisfaction to be entered up, as of the date on which a later judgment was entered up, and directed sums received by the first judgment creditor, since that time, to be paid to the second judgment creditor; but not any of the sums received prior to the signing of the second judgment.

**1097.** The necessity for the registration of judgments under the Middlesex and other acts (*z*) (**45**), was not affected by 1 & 2 Vict. c. 110, s. 13, and 2 & 3 Vict. c. 11, s. 2, under which judgments became charges when registered in the Common Pleas. The construction of the statutes was, that judgments upon lands in the register counties bound, when registered in the Common Pleas, from the time of registration under the register acts (*a*). Hence a mortgage of a term of

(*u*) c. 45, s. 3.

(*v*) *Wise v. Beresford*, 3 Dru. & War. 276. It being not illegal in Ireland to make a specific charge on a benefice during the incumbent's life.

(*x*) *Williams v. Craddock*, 4 Sim. 313.

(*y*) *Cottle v. Warrington*, 5 Barn. & Ad. 447; 2 N. & M. 227.

(*z*) Middlesex, 7 Ann. c. 20, s. 18; East Riding, 6 Ann. c. 35, s. 19; North Riding, 8 Geo. 2, c. 6, s. 18.

(*a*) *Westbrooke v. Blythe*, 3 El. & Bl. 737; 2 C. L. R. 1660; 1 Jur., N. S.



years, registered in a county registry before the issuing of *elegit* upon a judgment registered earlier but only in the Common Pleas (*b*), prevailed over the judgment; and a judgment registered both in the Common Pleas, and in the county, was preferred to one which was earlier registered in the Common Pleas, but later in the county (*c*). On the same principle it has been held, that judgment creditors, registered only in the Common Pleas, were not necessary parties to a foreclosure suit by a judgment creditor registered there, and also in the county (*d*). These decisions must now be read with reference to 27 & 28 Vict. c. 112, s. 1 (156).

**1098.** The doctrine of notice does not affect the priorities between judgment creditors. Apart from the registry acts, equity would not, on the ground of notice, assist a prior judgment creditor to take from one of later date the fruit of his diligence in first obtaining execution at law. And the judgment creditor is not a purchaser or mortgagee within the registry acts; nor a mortgagee for this purpose under 1 & 2 Vict. c. 110. Neither is the position of a subsequent judgment creditor, who claims under a legal title, and generally in *invitum*, like that of a subsequent purchaser or mortgagee, whose title being equitable only cannot (as it would if taken with notice) be used contrary to equity. The priority gained by the earlier county registration of a subsequent judgment was therefore held good, though the creditor entered it up with notice of an earlier judgment (*e*).

**1099.** A decree or judgment will not prevail over a legal conveyance, executed before the registration of the decree,

84; *Johnson v. Holdsworth*, 1 Sim., N. S. 106; *Benham v. Keane*, 1 J. & H. 685; 3 De G., F. & J. 318; 7 Jur., N. S. 1096; 8 *id.* 604.

(*b*) *Westbrooke v. Blythe*, *supra*.

(*c*) *Hughes v. Lumley*, 4 El. & Bl. 274; 3 C. L. R. 242; 1 Jur., N. S. 422; *Neve v. Flood*, 33 Beav. 666; 10 Jur., N. S. 607; 34 L. J., N. S., Ch. 89.

(*d*) *Johnson v. Holdsworth*, 1 Sim., N. S. 106.

(*e*) *Benham v. Keane*, *supra*. It was intimated that for this purpose a judgment would be treated as a contract, where it was given as a security under an express agreement to lend money. It will, however, be remembered that in contemplation of law all judgments are *in invitum* (157).

though the deed was not registered in the county, if the decree were registered with notice of the conveyance (*f*).

**1100.** Under 23 & 24 Vict. c. 38, s. 3 (**186**) a judgment, in the administration of assets, had no priority over, but ranked as, a simple contract debt, unless it were duly registered, so as to bind lands, at the time of the passing of the act, or afterwards during the life of the judgment debtor (*g*).

The 4th section of the same act, under which a registered judgment had no priority against heirs, executors or administrators, in the administration of assets, unless, at the death of the testator or intestate, five years should not have elapsed from the date of the entry thereof on the docket, or the only or last re-registry, did not affect rights in existence at the passing of the act; so that a judgment, not re-registered within five years from the death of a debtor dying before the passing of the act, retained its priority in the administration of assets, as a judgment incapable of being docketed, and not requiring to be registered for the purposes of administration (*h*).

**1101.** In the administration of assets between one judgment and another obtained against the testator, precedency or priority of time is not material. The first execution will be preferred; and before execution the executor may pay whom he will first (*i*). But judgments against executors or administrators, and decrees obtained by individual creditors for payment out of the assets of the testator, have priority according to date (*j*).

And the priority of judgments so obtained is not affected either by their non-registration (*k*), or by the abolition of the

(*f*) *Lee v. Green*, 6 De G., M. & G. 155; 2 Jur., N. S. 170.

(*g*) *Waller (or Walter) v. Turner*, 10 Jur., N. S. 147; 33 L. J. (Ch.) 232; *Kemp v. Waddingham*, L. R., 1 Q. B. 355.

(*h*) *Evans v. Williams*, 2 Dr. & Sm. 324; 11 Jur., N. S. 256.

(*i*) *Wentworth*, Off. Executor, 269, ed. 14.

(*j*) *Morrice v. Bank of England*, 3 Sw. 573; *Abbis v. Winter*, id. 578, n.; *Dollond v. Johnson*, 2 Sm. & G. 301.

(*k*) *Gaunt v. Taylor*, 3 Sc. N. R. 700; 3 Man. & G. 886; *Jennings v. Rigby*, 33 Beav. 198; 9 Jur., N. S. 1144; 33 L. J., Ch. 149.

distinction between specialty and simple contract debts in the administration of assets (*l*).

Where a creditor obtains judgment against a legal personal representative, and on the same day a decree is made for the administration of the testator's estate, it is considered that the judgment and decree were obtained at the same moment, and the judgment creditor comes in *pari passu* with other creditors (*m*).

Where the judgment has been obtained against the executors, pending an administration suit, the creditor will not be deprived of the fruit of his diligence, if there have been great and inexcusable delay in the conduct of the suit (*n*). An attachment in the Lord Mayor's Court against the assets of a deceased debtor does not, however, give any priority over the other creditors (*o*): nor does a judgment in the same court against a garnishee confer the rights of a judgment creditor in the administration of the garnishee's assets (*p*).

**1102.** Although a foreign judgment, not being matter of record in England, will not bind land, or have priority there as a specialty (*q*), it may have priority in the administration of assets, against property sent by the executors from the country in which the judgment was recovered before the creditors there were satisfied; because the assets must be administered as if they had remained in that country, and according to the order of priority there in force (*r*).

**1103.** A creditor by judgment obtained by default against an executor, in respect of his testator's debt, will have precedence against the executor's estate, over a later judgment against him in respect of his personal debt (*s*); because, by

(*l*) 32 & 33 Vict. c. 46; Williams' Estate, Re, L. R., 15 Eq. 270.

(*m*) Parker v. Bingham, 33 Beav. 411.  
535.

(*n*) Larkins v. Paxton, 2 Beav. 219.

(*o*) Redhead v. Welton, 29 Beav. 521.

(*p*) Holt v. Murray, 1 Sim. 485.

(*q*) Harris v. Saunders, 4 B. & C.

(*r*) Cook v. Gregson, 2 Dr. 286.

(*s*) Higgins, Re, 2 Gif. 562; 7 Jur., N. S. 403.

allowing the judgment to go by default, the executor has admitted assets of the testator, and has bound his own estate (*t*).

If the sheriff be in possession under a writ of execution which becomes void on the bankruptcy of the debtor, and he is also in possession of a writ obtained by another creditor under a valid judgment, the latter will become the first writ, and will have priority over the assignees in the bankruptcy (*u*).

**1104.** The creditor who first lodges the writ of *levari facias*, is entitled to the sequestration; and the order of sequestration where there are several writs is according to the order of the delivery of the writs (*x*).

*Of Priority under the Bankrupt and other Acts.*

**1105.** The general rule in bankruptcy as to priority (over which the Bankruptcy Court now has jurisdiction) is, that the following debts are to be paid in priority to all other debts, but rank equally among themselves, and are payable in full subject to abatement in equal proportions, in case the property be insufficient to meet them, viz.:—(1) All parochial or other local rates due at, and due and payable within twelve months next before the date of the order of adjudication; and all assessed taxes, land, property or income tax assessed up to the 5th April next before the date of the order of adjudication, and not exceeding in the whole one year's assessments: (2) All wages or salary of any clerk or servant in the employment of the bankrupt at the date of the order of adjudication, not exceeding 50*l.*; and all wages of any labourer or workmen in the employment of the bankrupt at the same time, not exceeding two months' wages: save as aforesaid, all debts proveable under the bankruptcy shall be paid *pari passu* (*y*).

(*t*) *Rock v. Leighton*, 1 Salk. 310.

(*u*) *Graham v. Witherby*, 7 Q. B. 41.

(*x*) *Sturgis v. Bishop of London*, 7 E. & B. 542.

(*y*) Bankruptcy Act, 1869, ss. 32,

72. The clause relating to rates, with some variations, is in the Bankruptcy (Ireland) Amendment Act, 1872, c. 58, s. 49.

This rule, of course, does not affect secured creditors whose rights are provided for in several parts of the act (870).

**1106.** As to the creditor's right of execution, the provision of the Bankrupt Law Consolidation Act, 1849 (*z*),—that no creditor having security for his debt, or having made any attachment in London or in any other place of the goods and chattels of the bankrupt, should receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure *and* sale upon, or any mortgage of or lien upon, any part of the property of such bankrupt, before the date of the fiat or filing of a petition for adjudication of bankruptcy,—having been repealed and not re-enacted, it has been held (*a*) in a case (in which the judgment debt being for less than 50*l.* was) not within sect. 87 (**1107**) of the Act of 1869, that the title of the execution creditor who has only seized the goods of his debtor before an act of bankruptcy is valid against the bankruptcy trustee, notwithstanding a bankruptcy adjudication before the sale, upon the principle that he acquired a valid legal title by the seizure (which it has further been held is necessary to confer a title (*b*)), of which the statute did not deprive him; and the result is held not to be affected by the provision (*c*) which empowers the Court of Bankruptcy after the presentation of a bankruptcy petition to restrain further proceedings in any action, suit, execution or other legal process against the debtor in respect of any debt proveable in bankruptcy; by which it was not intended to affect the rights of creditors *inter se* (*d*).

**1107.** It is provided by the Act of 1869 (*e*), that if the goods have been taken in execution in respect of a judgment

(*z*) 12 & 13 Vict. c. 106, s. 184.

(*a*) Slater *v.* Pinder, L. R., 6 Ex. 228; 7 *id.* 95; Rocke, Exp., L. R., 6 Ch. 705; Bailey, Exp., 13 Eq. 314; where the debt exceeded 50*l.*

(*b*) Williams, Exp.; Davies, Re, L. R., 7 Ch. 314.

(*c*) Act of 1869, s. 13, Rule 260.

(*d*) Rocke, Exp., *supra*; Lovering, Exp., L. R., 17 Eq. 452.

(*e*) Sect. 87. A corresponding provision affecting execution in respect of a judgment or civil bill decree, for a sum exceeding 20*l.*, is in the Bankruptcy (Ireland) Amendment Act, 1872, c. 58, s. 54.

for more than 50*l.* and sold, the proceeds are to be retained and paid to the trustee in the event of notice of a petition of bankruptcy by the debtor being given to the sheriff or county court officer within fourteen days; but in case of no such notice, or if no adjudication of bankruptcy is made on the petition or on any other petition of which the officer has notice, he is to deal with the proceeds as if no notice of the presentation of the petition had been served upon him. And under this section of the act it has been held that the trustee will be entitled to the proceeds of sale, although the bankruptcy petition was presented before the sale took place (*f*).

The seizure and sale are not void although they constitute an act of bankruptcy; and the execution creditor will be entitled to the proceeds of the sale if he had no notice of a prior act of bankruptcy, and no notice of a petition be given within fourteen days (*g*). But the seizure and sale prevent the execution creditor from issuing execution against the same debtor in respect of another debt, because he must necessarily do so with notice of the act of bankruptcy caused by himself by means of the first seizure and sale (*h*).

A secured creditor is not deprived of his security by a composition under the composition clauses of the Bankruptcy Act, 1869 (*i*).

**1108.** A sequestration of the profits of a benefice issued on the application of the trustee in bankruptcy of the beneficed clergyman, has priority over any other sequestration issued after the commencement of the bankruptcy, except a sequestration issued before the date of the order of adjudication by or on behalf of a person who at the time of the issue thereof had not notice of an act of bankruptcy committed by the bankrupt and available against him for adjudication (*k*) (**775**).

The stipends to be paid to curates appointed by the bishop to benefices under sequestration, have priority over all sums

(*f*) Rayner, Exp., L. R., 7 Ch. 325.

(*g*) Villars, Exp., L. R., 9 Ch. 432.

(*h*) Dawes, Exp., L. R., 19 Eq. 438.

(*i*) See s. 126. Birmingham, &c.

Coke Co., Exp., L. R., 11 Eq. 204;

Jones, Exp., L. R., 10 Ch. 663.

(*k*) Bankruptcy Act, 1869, c. 71,

s. 88.

payable by virtue of the judgment or the bankruptcy under which the sequestration issues, but not over liabilities in respect of charges on the benefice (*l*).

**1109.** Upon the death, bankruptcy or insolvency (including liquidation by arrangement in England, *cessio bonorum* in Scotland, and petition for arrangement in Ireland) of any officer of a friendly society having in his possession by virtue of his office any money or property belonging to the society, or if any execution, attachment or other process be issued, or action or diligence raised against such officer or against his property, his heirs, executors or administrators or trustee in bankruptcy or insolvency (including an assignee in Ireland and a judicial factor in Scotland), or the sheriff or other person executing such process, or the party using such action or diligence respectively, shall upon demand in writing of the trustees of the society or any two of them, or any person authorized by the society or by the committee of management of the same to make such demand, pay such money and deliver over such property to the trustees of the society in preference to any other debts or claims against the estate of such officer (*m*).

The institution of a suit is sufficient demand in writing; and the neglect of the trustees of the society to audit the accounts of the defaulting officer will not deprive the society of the statutory right of priority (*n*).

**1110.** Mortgages made to the commissioners under the act for granting relief to owners of West India estates (*o*) have priority over all other mortgages or securities affecting the property, in respect of which the advances are made; and the securities given to the commissioners by persons with partial interests in the estates have priority over remainders, reversions and limitations, which the owners of such partial inte-

(*l*) The Sequestration Act, 1871, c. 45, s. 3.

(*m*) Friendly Societies Act, 1875, s. 15 (7).

(*n*) *Absolum v. Gething*, 9 Jur., N. S. 1263, under corresponding provision of 18 & 19 Vict. c. 63, s. 23.

(*o*) 2 & 3 Will. 4, c. 125, ss. 21, 22.

rests are unable to bar. But the commissioners can only acquire priority, in cases which fall within the act; and where, by reason of the case being not within the act, they cannot get priority, the court will not allow them to complete a loan. They were, therefore, restrained from lending money to repay costs *already incurred* of restoring injured estates, in part of which other persons were interested as prior mortgagees, having a receiver and manager in possession (*p*).

1111. The priorities of mortgagees of public works, and of the property of public companies, are frequently regulated, either by the special acts of parliament under which the undertakings are prosecuted, or by general acts incorporated therein. The general tendency of these regulations is to give equal priority, irrespective of date, and a right to proportionate parts of the property comprised in the respective mortgages, according to the extent of the mortgagee's advances (*q*).

(*p*) *Borradaile v. Brickwood*, 1 Y. & C. 60.

(*q*) See the acts contained in the Appendix.



## CHAPTER VIII.

### OF THE LIABILITY OF THE INCUMBERED ESTATE TO THE PAYMENT OF THE DEBT.

**1112.** *Of Cases in which the incumbered Estate is primarily liable to, or entitled to be exonerated from, the Debt.*

**1141.** *Of Cases in which two or more Estates are liable to contribute to the Debt.*

**1149.** *Of Cases in which incumbered and other Estates will be marshalled.*

**1112.** EVERY mortgage implies a loan, and every loan implies a debt, for which the personalty of the borrower is liable, though he have neither entered into bond nor covenant for payment of it; but the debt is of the nature of simple contract only, unless there be a bond or covenant to give it the character of a specialty (*a*). Now the mortgagee, when his mortgage is of the ordinary kind (**11**), may at his discretion use either or both of his remedies against the mortgagor (**482**), in respect of this his personal liability, and against the mortgaged estate; and the mortgagor if he transfer the mortgaged estate, and his personal representatives if he die, though no longer in possession, still remain liable to the mortgagee for the debt; the estate also remaining liable in the hands of the purchaser, heir, or devisee of the mortgagor.

**1113.** But the election by the mortgagee of his remedy does not affect the principle that the personal estate of the mortgagor is primarily liable for the debt, which in case of his death will, as between his real and personal representatives, be therefore generally payable by the latter; and

(*a*) *Thomas v. Terry*, Gilb. Eq. R. 110; *Meynell v. Howard*, Pre. Ch. 61. See *King v. King*, 3 P. W. 358; *Howell v. Price*, 1 Id. 290; *Ancaster v. Mayer*, 1 Bro. C. C. 454; *Digby, Exp.*, Jac. 235.

though upon a transfer of the estate in the lifetime of the mortgagor, the transferee, who generally contracts to take upon himself the burden of the debt, can then have no such equity against the transferor; yet either by the terms of such contract for payment, or by other acts, he sometimes so adopts the debt as to create between his own real and personal representatives an equity similar to that which arises on the death of the original mortgagor. Out of such transactions, and out of the original subjection of more than one estate to the mortgage, and of the testamentary or other dispositions of the mortgagor for payment of the debt, arise the doctrines of EXONERATION, CONTRIBUTION, and MARSHALLING of securities.

**1114.** As to the law of Exoneration; FIRST, the ancient rule is that as between the personal representatives of the mortgagor and the heir or devisee of the whole or part of the mortgaged estate the personalty of the mortgagor shall be primarily liable to the debt, and shall exonerate the mortgaged estate, which is treated only as a collateral security (*b*). The same principle as to the liability of the general assets entitles the legatee of a chattel specifically devised, but which the testator has pledged, to have the debt discharged by the executor, or to be placed in the same situation as if that duty had been performed (*c*).

This rule is to be understood as applying only to such securities as have been made to secure an actual debt due from the mortgagor at the time of the mortgage; in which class is included unpaid purchase-money, whether consisting of principal money charged on the estate in the ordinary way, or of an annuity secured by a rent-charge issuing out of the estate (*d*). But it does not apply to a transaction in which no

(*b*) *Pockley v. Pockley*, 1 Vern. 36; *Cope v. Cope*, 2 Salk. 449; *Bartholomew v. May*, 1 Atk. 487; *Belvedere v. Rochfort*, 5 Bro. P. C. 299. And by the custom of London the mortgage debt must be paid out of the personalty in preference to the customary or or-

phanage part; because till the debts be paid, the custom cannot take effect. (*Ball v. Ball*, cited 1 Vern. 37, n., and in *Rider v. Wagner*, 2 P. W. 335.)

(*c*) *Knight v. Davis*, 3 M. & K. 358.

(*d*) *Yonge v. Furze*, 20 Beav. 380.

debt is created, such as a security upon an estate for a provision (*e*) under a marriage settlement, even though there be a covenant for payment; unless the provision were first secured by a covenant creating a debt, to which the covenant for securing the charge upon the estate was manifestly auxiliary (*f*). Nor does the doctrine apply to a security for a loan where the security only, and not the personal ability or circumstances of the borrower, were considered; as in the case of the South Sea loans, which were raised only on the credit of the stock (*g*); nor yet to money raised by a tenant for life, or other person who has only a limited interest, under a power (*h*) (582).

And the rule itself has been altered by the statute commonly known as "Locke King's Act," (*i*), which declares that when any person shall after 31st December, 1854, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not by his will or deed or other document have signified any contrary or other intention (1140), the heir or devisee shall not be entitled to have such mortgage-debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof according to its value (1142), bearing a proportionate part of the mortgage debt charged on the whole thereof. There is also a proviso (which is only for the benefit of mortgagees (*h*)), that nothing in the act shall affect or diminish any right of the mortgagee to obtain full payment or satisfaction of his mortgage debt, either out of the personal estate of the person so dying as aforesaid or otherwise,

(*e*) *Lanoy v. Athol*, 2 Atk. 444;  
*Graves v. Hicks*, 6 Sim. 398; *Loosemore v. Knapman, Kay*, 123.

(*f*) *Field v. Moore*, 7 De G., M. & G. 691.

(*g*) Per Lord Talbot, in *King v. King*, 3 P. W. 358.

(*h*) *Digby, Exp.*, Jac. 235.

(*i*) 17 & 18 Vict. c. 113.

(*h*) *Lipscomb v. Lipscomb*, L. R., 7 Eq. 501.

or shall affect the rights of any person claiming under or by virtue of any will, deed or document made at the passing of the act, or to be made before the 1st January, 1855 (1136).

**1115. SECOND.** When the mortgaged estate has descended or has been devised by the mortgagor, or when he has sold it in his lifetime, then, and in some other cases to be presently mentioned, inasmuch as the person who has become possessed of the estate did not contract or become primarily responsible for the debt, his personal estate shall not, as between his representatives, be liable to exonerate the mortgaged property (*l*).

This rule also applies to a person who raises money by mortgage under a power (*m*), and who, if he pay off the mortgage, will be an incumbrancer for the amount, though he take no assignment, and though the ultimate reversion be vested in himself (*n*). And also to one who, having mortgaged his estate to secure the debt of another, stands in the position of a surety and is entitled to be exonerated by the principal debtor (*o*).

**1116.** Within this equity stands the wife (1224) who has joined in mortgaging her estate to secure money raised for the benefit of her husband (*p*), and the husband who has covenanted to pay, in a mortgage for raising the wife's portion out of her estate (*q*).

Where the estate, whether separate or not, of the wife, or over which she has a power of appointment, and whether or not it be settled to her separate use (*r*), is mortgaged, and the money is paid to her and her husband, or to him, it is con-

(*l*) *Lawson v. Hudson*, 2 Bro. C. C. 57; *Scott v. Beecher*, 5 Mad. 96; *Tweddell v. Tweddell*, 2 Bro. C. C. 101, 152; *Woods v. Huntingford*, 3 Ves. 128; *Cope v. Cope*, 2 Salk. 449.

(*m*) *Jenkinson v. Harcourt, Kay*, 688.

(*n*) Per Lord Eldon, *Digby, Exp.*, Jac. 235; *Redington v. Redington*, 1 Ba. & Be. 181.

(*o*) *Lee v. Rook*, Mos. 818; *Peirs v.*

*Peirs*, 1 Ves. 521; *Evelyn v. Evelyn*, 2 P. W. 659.

(*p*) *Huntington v. Huntington*, 2 Vern. 437; *Tate v. Austin*, 1 P. W. 264; per Lord Hardwicke, *Peirs v. Peirs*, 1 Ves. 521; *Lancaster v. Evors*, 10 Beav. 154.

(*q*) *Bagot v. Oughton*, 1 P. W. 347.

(*r*) *Hudson v. Carmichael, Kay*, 613; *Aguilar v. Aguilar*, 5 Mad. 414; *Thomas v. Thomas*, 2 Kay & J. 79.

sidered *prima facie* that it was borrowed for his benefit; and his estate is first applied, as for payment of his own debt, unless the presumption be rebutted by proof on the part of the husband, that the whole or some part of the money did not come to his hands (*s*). And the result will be the same, where the husband has paid off the mortgage, and has taken an assignment of it in trust for himself (*t*).

But if an estate, already in mortgage, descend (*u*) upon a married woman, or it be proved that she mortgaged for the benefit of another person than her husband (which may be shown by parol evidence (*v*)), or if a feme sole mortgage before marriage (*x*), although the husband covenant to pay the money, the wife or her heirs after the husband's death shall not compel payment out of his personal estate, because the debt was not originally his; and his covenant is but an additional security to the lender, and does not change the nature of the debt. On the other hand, if the wife come to redeem such a mortgage after the husband's death, where he has paid off part of the mortgage debt, the same principle is carried out actively in favour of the husband's estate; which is entitled to stand in the mortgagee's place for all sums paid by the husband in reduction of the debt (*y*).

**1117.** As to money, the whole or the greater part of which was applied in payment of debts incurred by the wife *dum sola*, or which was paid into the hands of the wife and converted by her to her own use as her separate money; or which she (having the absolute disposal thereof) has appropriated to the use of her husband, although it seems that parol evidence of her intention will not be received contrary to the terms of the deed; or in respect of money as a consideration or equivalent for which a settlement has been made upon the wife, there

(*s*) *Pocock v. Lee*, 2 Vern. 604; *Tate v. Austin*, 2 Vern. 689; 1 P. Wms. 265; *Parteriche v. Powlet*, 2 Atk. 383; *Earl of Kinnoul v. Money*, 3 Sw. 202, n.; see *Ruscombe v. Hare*, 6 Dow. 1.

(*t*) *Huntington v. Huntington*, 2 Vern. 437; 2 Bro. P. C. 1.

(*u*) *Bagot v. Oughton*, 1 P. Wms. 347.

(*v*) *Gray v. Dowman*, 27 L. J., N. S., Ch. 702; 6 W. R. 571.

(*x*) *Pitt v. Pitt*, T. & R. 180.

(*y*) *Id.*: and see *Nelson v. Booth*, 3 Jur., N. S. 951.

will be no indemnity to her estate against the mortgage, though the husband have given a bond or covenant (*z*); and it will make no difference if part of the money was applied to his use, as the court will not attribute a divided intention to the parties. The wife will also have no claim to exoneration, if, after her husband's death, she desire his executor to apply his personalty in payment of the legacies given by his will, whether the personal estate was so applied before or after his direction (*a*).

And even where the money was raised for the benefit of the husband alone, the wife will have no claim, if the mortgage was made in execution of a joint power in the husband and wife to raise money by mortgage, and she took the estate subject to the power; because the estate conveyed to the mortgagee was not that of the wife alone, but was created under the power, and in conformity with the purpose of the settlement (*b*).

**1118.** A widow claiming dower has no right to be indemnified by the heir against her husband's mortgage; subject to which she must take as a disposition pro tanto (*c*); but she will be exonerated as to ordinary debts, to which the land was not liable during the husband's life (*d*).

**1119.** It has been said, that where the wife comes for exoneration of her mortgaged estate against the assets of the husband, all his other debts shall be preferred to this claim (*e*); and the dictum was cited approvingly by Lord Thurlow (*f*); but its correctness has been doubted (*g*) by Wood, V.-C., even where the wife's mortgaged estate is not settled to her separate use: the right of the wife being better than that of the heir,

(*z*) *Lewis v. Nangle*, Amb. 150; per Lord Thurlow in *Clinton v. Hooper*, 3 Bro. C. C. 200; *Earl Kinnoul v. Money*, 3 Sw. 208, note.

(*a*) *Clinton v. Hooper*, 3 Bro. C. C. 200.

(*b*) *Scholefield v. Lockwood*, 32 Beav.

434; 9 Jur., N. S. 739, 1258; 33 L. J., Ch. 106.

(*c*) *Jones v. Jones*, 4 K. & J. 361.

(*d*) *Spire v. Hyatt*, 20 Beav. 621.

(*e*) *Tate v. Austin*, 1 P. Wms. 265.

(*f*) *Clinton v. Hooper*, 3 Bro. C. C. 211; 1 Ves. jun. 186.

(*g*) *Hudson v. Carmichael, Kay*, 622.

with which it had been compared, because, unlike him, she can assert it against legatees; and, by virtue of an implied assumpsit between husband and wife, she is considered to have the full right of a surety to be satisfied out of her husband's estate. And where the mortgaged estate was separate property (*h*), and the wife joined the husband in a mortgage, which expressed that the money was paid to them both, and he covenanted for repayment, it was held to be clear, that the wife should be treated as a distinct person, having the same right as a stranger to be exonerated out of her husband's estate, as against his other creditors.

**1120.** Where the wife joined her husband in granting an annuity on her separate estate, as well as on other property, to which the husband was entitled *jure mariti*, she was held to be only a surety in the grant of the annuity, which, upon his insolvency, was ordered (*i*) to be kept down first out of the income of his property, as between her and him, his assignee and subsequent annuitants.

Where the mortgaged estate of the wife is exonerated out of the husband's assets, none of his creditors have a right to stand in the place of the mortgagee, as against the wife's estate (*h*).

Where the wife's estate, subject to a mortgage, was settled to her separate use, and during coverture the husband covenanted, upon an assignment, for payment by him or his wife, and received the rents during the coverture by her consent, having also verbally promised before the settlement to pay off the mortgage; it was held, that his estate was not liable at the suit of the widow, though it might be so as between it and the mortgagee (*l*).

**1121.** The rule concerning the admission of parol evidence in such mortgages appears to be that, though parol evidence is

(*h*) *Hudson v. Carmichael*, Kay, 613; 18 Jur. 851; *Parteriche v. Powlet*, 2 Atk. 383.

(*i*) *Aguilar v. Aguilar*, 5 Mad. 414.

(*h*) Per Lord Hardwicke, *Robinson v. Gec*, 1 Ves. 252.

(*l*) *Christmas v. Christmas*, Sel. Ca. in Ch. 20.

not admissible to show that a transaction purporting by the instruments themselves, or by them and by other evidence not parol, to be for the husband's benefit, was of a different kind; it may be shown that the debts of the wife were paid with the money, or that it was in fact applied to some other than the purpose for which it was raised; or that, under the circumstances, the husband's estate is not primarily liable<sup>(m)</sup>. Hence, evidence is admissible, that the widow, in conversation with the executor, admitted an agreement that the debt should be discharged out of the estate, and disclaimed her right to exoneration. And this was compared to the case of the heir telling the executor that he would not press him for exoneration, and so inducing him to pay the legacies; but it is not material, under such circumstances, whether the legacies given by the husband be paid before or after the widow's admission, or whether the admission induced the executor to pay them.

**1122. THIRD.** The person who originally contracted the debt may shift the primary liability, which the old law attached to his personalty, to the mortgaged, or some other estate; or may fix it upon the personalty, or on another estate, in cases in which it would fall upon the mortgaged estate under Locke King's Act (1136); and he who has acquired the mortgaged estate by descent, devise, or purchase, or is otherwise not primarily liable for the debt, may adopt it, or show an intention that it shall be borne by some other than the mortgaged estate. In considering these rights, it will be convenient to show:—

(1). Under what circumstances the personalty of the owner of the mortgaged estate, who was not originally liable for the debt, may become so, by his subsequent dealing with the debt or the estate, or by other events in his lifetime.

(2). What expression of intention will exonerate the personalty of the owner of the estate, whose personalty was originally liable; or the mortgaged estate, where it was originally liable either (a) under the old law or (b) under Locke King's Act: and also the general effect of that act.

(m) *Clinton v. Hooper*, 3 Bro. C. C. 201; 1 Ves. jun. 173; *Hudson v. Car-*

*michael, Kay*, 620, per Wood, V.-C.; *Thomas v. Thomas*, 2 Kay & J. 79.  
*Gray v. Brown*, 27 L.J. (N.S.) 471



**1123.** (1). The covenant or agreement of the purchaser or devisee of the whole or part of an estate mortgaged or incumbered with a charge, to pay or take upon himself the debt and interest, and, in the case of a purchase, to indemnify the vendor against it (*n*), or the covenant of one of several purchasers, to take upon himself a certain part of the debt and to indemnify the purchasers of the other parts (*o*), does not subject the personal estate of the covenantor, as between his own real and personal representatives, to the payment of the debt; the indemnity being only such as would be compelled by a court of equity without any specific contract for the purpose (*p*).

**1124.** The rule is the same, where the purchaser, devisee, or heir of the mortgaged estate, enters into a covenant for payment with a transferee of the mortgage (*q*); the covenant being merely treated as a necessary incident of the transfer, and a liability only as regards the transferee; and this even where the covenant is to pay a different and higher rate of interest than that reserved by the mortgage (*r*); and though, where the estate has devolved upon tenants in common, distinct provisions have been made for re-conveyance of the different shares, upon payment of corresponding parts of the whole debt, which is covenanted to be paid in the like proportions (*s*).

**1125.** In the case of a purchaser the case is not altered, by

(*n*) *Tweddell v. Tweddell*, 2 Bro. C. C. 101, 152; *Hamilton v. Worley*, 2 Ves. jun. 62; *Butler v. Butler*, 5 Ves. 534; *Barham v. Earl of Thanet*, 3 M. & K. 607.

(*o*) *Forrester v. Leigh*, Ambl. 171.

(*p*) Per Lord Eldon in *Waring v. Ward*, 7 Ves. 332.

(*q*) *Leman v. Newnham*, 1 Ves. 51; *Billinghurst v. Walker*, 2 Bro. C. C. 604; *Shafto v. Shafto*, 1 Cox, 207. As to the liability of the purchaser under such a covenant see *Allard v. Kimberley*, 12 M. & W. 410. Where the covenant is in general terms, it is for payment according to the provisions of

the mortgage deed. (*Trott v. Smith*, 12 M. & W. 688.)

(*r*) *Shafto v. Shafto*, per Lord Eldon, in *Waring v. Ward*. In *Donisthorpe v. Porter*, 2 Eden, 162, Ambl. 600, it was said, and in *Bruce v. Morice*, 2 De G. & S. 389, decided, that a new covenant for payment (the interest in the latter case being reserved at a different rate), with a new proviso, gave a right to exoneration; but the circumstances in the latter case were somewhat special, and the dictum in the former does not agree with the other authorities referred to.

(*s*) *Hedges v. Hedges*, 5 De G. & S. 330; 16 Jur. 634.

reason of an imperfect or abandoned intention to pay the debt, shown by his naming the mortgagee a party to the conveyance, for the purpose of concurring therein upon receiving the sum due to him (*t*). But it is otherwise, if the purchaser enter into a special contract with the mortgagee for payment of the debt, and accept from him a benefit which he could not have had from the vendor (*u*), such as a covenant for quiet enjoyment until default.

**1126.** Again, if, instead of making a mere transfer of the security, the purchaser, devisee, or heir, borrow a sum of money, making a new conveyance by way of mortgage on the security of the whole, or of part of the estate, to a new mortgagee, free from the original mortgage, the former debt is at an end, and the new one is the personal debt of the owner of the estate (*x*). And if the latter unite mortgages of his own to those which already affect the estate, and covenant for payment of the aggregate debt, the whole sum which is due on the consolidated security will be considered as his personal debt, and the court will refuse to separate the debts which he himself has united (*y*).

So where the devisee of an estate charged with portions settled it, and covenanted not merely to pay the portions, but also to convey the estate discharged of them, it was held to be an adoption of the debt, and not merely a covenant of indemnity (*z*).

**1127.** On the other hand, it is evidence of an intention that the real estate shall remain primarily liable, when the owner, having the entire control as well over it as over his personalty aliens it, either to a volunteer or purchaser for valuable consideration, (especially if he does so expressly subject to the mortgages;) without showing any indication, by a covenant

(*t*) *Barry v. Harding*, 1 J. & L. 475.

(*u*) *Earl Oxford v. Rodney*, 14 Ves. 417.

(*x*) *Waring v. Ward*, 7 Ves. 332;  
*Barham v. Earl Thanet*, 3 M. & K. 607; *Bagot v. Bagot*, 10 Jur., N. S.

1169; 34 Beav. 184.

(*y*) *Woods v. Huntingford*, 3 Ves. 128; *Lushington v. Sewell*, 1 Sim. 435;  
*Townshend v. Mostyn*, 26 Beav. 72.

(*z*) *Barham v. Earl Clarendon*, 10 Hare, 126.

with the grantee, of an intention to exonerate it, or otherwise of an intention to pay the debt out of his personal estate (*a*). Or if, being tenant for life with remainder to such uses as he shall appoint, he exercises the power only for the purpose of mortgaging, without appointing the fee to himself; and so leaves himself in the position of a person with a limited interest in an incumbered estate: who, if he should discharge the mortgage, is assumed to do so for his own benefit (*b*) (1308).

1128. Another form in which this question arises is in a further stage of devolution of the mortgaged estate; viz. where the person, whether heir or devisee of the estate, in whose hands it was entitled to exoneration out of the personalty of the deceased mortgagor, himself becomes entitled to that personalty, and dies, without having discharged the mortgage. The same personalty in the hands of *his* executor (*c*) shall not exonerate the estate in the hands of his heir, notwithstanding the liability which the first heir or devisee was under to be sued at law on the covenant in the original mortgage (*d*). Neither will the covenant by an heir so circumstanced, to indemnify against the mortgage debt another estate which by law he was bound to indemnify, amount to an adoption of the debt (*e*).

This doctrine has been applied to a case, in which the first devisee of the estate, being also the executor of the mortgagor, but not having proved the will, had not acquired a complete title to the personalty out of which the estate was entitled to be exonerated, or had an opportunity of discharging the mortgage thereout (*f*). In this decision, however, the doctrine of *Scott v. Beecher* appears to have been followed as an arbitrary rule of

(*a*) *Jenkinson v. Harcourt*, Kay, 688;  
*Alen v. Hogan*, Ll. & G. t. Sugd. 231;  
*Vandeleur v. Vandeleur*, id. 241, n.

(*b*) *Jenkinson v. Harcourt*, supra.

(*c*) *Scott v. Beecher*, 5 Mad. 96;  
*Earl Clarendon v. Barham*, 1 Y. & C.  
C. C. 688; *Evans v. Smithson*, cited  
there; *Ilchester v. Carnarvon*, 1 Beav.

209; see *Hickling v. Boyer*, per Lord  
Truro, 3 M. & G. 635.

(*d*) *Taylor*, Re, 8 Exch. 384; see  
11 Geo. 4 & 1 Will. 4, c. 47.

(*e*) *Ilchester v. Carnarvon*, 1 Beav.  
209.

(*f*) *Swainson v. Swainson*, 6 De G.,  
M. & G. 648; 3 Jur., N. S. 145; see  
S. C. 4 id. 1011.

law, without special reference to the particular facts of the one case, or to the grounds of decision of the other; and particularly to have been made without regard to the fact, that the person who acquired both the mortgaged estate and the personalty of the original mortgagor, had died so soon after the latter, that she had no opportunity of applying the personalty in payment of the debt, and could not, therefore, have elected to continue it as a charge on the mortgaged estate; which election in *Scott v. Beecher* was considered to have been made, though it was thought unnecessary to press it as a primary ground of decision: or to the question whether the common heir of the first devisee and of the mortgagor was not entitled to claim the personalty of the latter as an exonerating fund, on the ground that it was still unadministered and applicable for the purpose. Upon this latter ground Wood, V.-C., had, in fact (though the case was not brought under the notice of Lord Cranworth in *Swainson v. Swainson*), refused to hold (*g*) that the personalty of an intestate mortgagor, to whose estate no administration had been taken out in the lifetime of his heir, should be applied by a subsequent administrator both of the mortgagor and his heir, to exonerate the mortgaged property in the hands of the common heir of both of them; pointing out, however, that, according to the present law as laid down by the several cases cited above, the equities are not, as they formerly were (*h*), affected by the argument that, because the personalty of the heir or devisee, who has become possessed of both real and personal estate, has been increased by permitting the charge to remain, *his* successor to the estate ought to be exonerated out of the personalty derived from the original mortgagor. But it should be observed, that the ground of decision against the exoneration of the real estate in *Scott v. Beecher*, upon which, and upon the other cases decided on its authority, the determination in *Swainson v. Swainson* was founded, was (as is correctly stated by Wood, V.-C., in the early part of his judgment in *Bond v. England*) that the heir of the devisee took an

(*g*) *Bond v. England*, 2 K. & J. 44.

(*h*) See Gilb. Lex Præt. 315; *Belvedere v. Rochfort*, 5 Bro. P. C. 299;

and see observations of Knight Bruce, V.-C., in *Earl Clarendon v. Barham*, 1 Y. & C. C. C. 688.

estate charged with a debt to which the ancestor was not personally liable; which corresponded with the facts in *Bond v. England*; and not, as was afterwards stated by the V.-C., that the same person had both funds under his control, which, as he said, did not happen in the last-mentioned case.

**1129.** The converse of the principle, that because the personalty of the heir or devisee has benefited by the security, it ought to exonerate the mortgaged estate, has been applied to throw the debt on the mortgaged estate, where the personalty had *not* received benefit (*i*); so that money raised by the heir, by mortgage, for discharging the ancestor's simple contract debts, for which the heir was not liable, was thrown, with the original mortgage debt of the ancestor, primarily on the realty. But in a modern case (*h*), in which specialty and mortgage debts of the deviser were paid off by the devisee by means of a new mortgage, it was considered that the borrowing of the money, and the giving a new mortgage, made the devisee's personal estate primarily liable, notwithstanding the purpose for which the loan was applied. This of course would not affect a mortgage made by the owner of an estate, to raise money with which the estate had been charged by the former owner (*l*).

**1130. (2) (a) (1122).** As to the expression of intention which will suffice to exonerate the personalty of the mortgagor when it was liable for the debt, or the mortgaged estate when the personalty was not liable. Although for the purpose of exonerating the personalty it is not now considered necessary that the intention should be declared by express words, or in terms which raise an irresistible conclusion, it must be so clearly expressed as to convince the mind of the judge, that the testator intended to charge the real estate

(*i*) *Earl Tankerville v. Fawcett*, 1 Cox, 237; 2 Bro. C. C. 57; and see *Perkins v. Baynton*, 2 P. W. 644, n.; where however there was a trust for sale of part of the realty for payment

of debts, and the residue was devised beneficially to the trustee.

(*h*) *Bagot v. Bagot*, 10 Jur., N. S. 1169; 34 Beav. 134.

(*l*) See *Noel v. Lord Henley*, Dan. 211, 322.

with, as well as to exonerate the personalty from, the debt. The intention must be sought as well in the context of the will as in any particular expressions. The relative value of the real and personal estates does not affect the question; and the various circumstances attending the testator's dispositions, his appointment of the same persons to be executors and trustees, the direction to pay funeral expenses out of the real estate, the manner of giving the residuary personalty, the giving it to a tenant for life of the devised estates, and the like, are matters which, far from affording any certain conclusion, may lead to entirely different inferences according to the circumstances in connection with which they are found (*m*).

**1131.** The exoneration will operate in favour only of the person for whose benefit the testator intended it; so that if the gift of the personalty intended to be exonerated should lapse by the death of the legatee in the testator's lifetime, or should otherwise fail, the exemption will fail also, whether the personalty has vested in a subject or in the Crown (*n*); unless an intention can be found to apply the exonerating fund in discharge of the debt, irrespective of the benefit to the intended legatee of the fund exonerated (*o*); or, with an intention to exonerate, there be no particular gift of the fund exonerated; for it must then be supposed that the exoneration was meant for the benefit of whoever should take that fund (*p*). The principle, that the benefit is intended only for the particular donee of the fund to be exonerated, is applied also where one estate has been directed to contribute to the mortgage debt charged on another, on failure of the devise of the estate intended to be relieved (*q*).

**1132.** The sufficiency of the expression of intention to

(*m*) See *Ancaster v. Mayer*, 1 Bro. C. C. 454; *Watson v. Brickwood*, 9 Ves. 447; *Hancox v. Abbey*, 11 Ves. 179; *Bootle v. Blundell*, 1 Mer. 193.  
 (n) *Hale v. Cox*, 3 Bro. C. C. 321; *Waring v. Ward*, 5 Ves. 670; *Dacre*

*v. Patrickson*, 1 Dr. & Sm. 186.

(*o*) See *Noel v. Henley*, Dan. 322; *Noel v. Noel*, 12 Pr. 214.

(*p*) *Milnes v. Slater*, 8 Ves. 295.

(*q*) *Carter v. Barnardiston*, 1 P. W. 505.

exonerate the personalty, like other questions which depend upon the construction of doubtful instruments by different judges, at different periods, is often difficult in proportion to the number of authorities. It has, however, been well established, that the personalty is not relieved by a devise of the mortgaged estate, or of that and other property "subject to the mortgage," or "subject to the payment of the mortgage," or "subject to debts," or by any other equivalent expression not amounting to a condition or direction that the devisee should pay the debt (*r*). The question becomes more difficult when words of that character are employed; but the favour formerly shown to the heir led the courts to struggle against the exoneration of the personalty, even under words of this import. Thus in an old case (*s*), a devise of land to E., *upon condition* that she paid all his debts and legacies, was held only to amount to a charge on the realty, but not to relieve the personalty; partly on the ground that the executor had a particular legacy only, and not the residue. And in another case (*t*), a devise to C., *he paying* all debts and legacies charged on the estate, and after his decease to B., was held to be of the like effect; but this also was decided on a special, and a stronger reason, viz., that the tenant for life was seventy years of age, the charge 2,600*l.*, and the estate but 600*l.* per annum.

On the other hand, in a more modern decision (*u*), the words "*he paying* a mortgage thereon," have been treated as a clear expression of intention that the debt should not be paid out of the personalty; though this was also supported by the special circumstances of a gift of part of the personalty less than the mortgage debt for the exoneration of the estate, and, therefore, implying that no other part of the personalty was to be so applied. Words of a similar kind, accompanied by a direction that neither of the devisees of the testator's real estates should

(*r*) *Serle v. St. Eloy*, 2 P. W. 386; *Astley v. Tankerville*, 3 Bro. C. C. 545; 1 Cox, 82; *Bickham v. Crutwell*, 3 M. & C. 763; *Goodwin v. Lee*, 1 K. & J. 377; 1 Jur., N. S. 226; per Wood, V.-C., in *Jenkinson v. Harcourt, Kay*, 688;

per Wigram, V.-C., *Johnson v. Child*, 4 Hare, 94.

(*s*) *Mead v. Hide*, 2 Vern. 120.

(*t*) *Bridgman v. Dove*, 3 Atk. 201.

(*u*) *Lockhart v. Hardy*, 9 Beav. 379.

take possession of any of the premises until the testator's debts should be paid, have also been held to constitute a charge on the devised estates (*x*).

The expression "I hereby charge and make liable my said estate," for moneys for which the estate alone was liable, and also (in the same sentence) for monies for which the testator was personally liable, was also held to create an active charge, making the estate primarily liable for the personal debt, by reason not only of the words of the charge, but of the application of them to the different kinds of debt (*y*).

**1133.** The personal estate will not be discharged by particular provisions, adjusting the payments which should be made on account of the debt by successive takers of the estate, if such provisions do not clearly charge the estate with the payments (*z*).

The personalty will, however, be exonerated by a general devise of lands for payment of the debts of the testator; because the description includes the mortgage debt (*a*); as it also will be, by a direction to apply a particular part of the real estate in payment of a particular debt, because so much only of the real estate being devised as will remain after payment of the debt, the devisee cannot claim more than has been given him (*b*).

**1134.** This principle will also be applied to prevent exoneration for the benefit of a person who was manifestly intended to take subject to the charge; and for the purpose of ascertaining the intention in such a case, the court will not only look at the will, but also at settlements to which the devised estates are subject (*c*).

(*x*) *Wisden v. Wisden*, 2 Sm. & G. 396; 18 Jur. 1090.

(*y*) *Evans v. Cockeram*, 1 Col. 428.

(*z*) *Watson v. Brickwood*, 9 Ves. 447.

(*a*) *Serle v. St. Eloy*, 2 P. W. 386.

The observations of Sir W. Grant in *Hancox v. Abbey*, 11 Ves. 179, seem to imply the contrary, but are explained by Lord Cottenham as appli-

cable to the particular circumstances of the case; see *Bickham v. Cruttwell*, 3 M. & C. 763.

(*b*) *Hancox v. Abbey*, 11 Ves. 179; *Hale v. Cox*, 3 Bro. C. C. 322.

(*c*) *Ibbetson v. Ibbetson*, 12 Sim. 206; *Lady Langdale v. Briggs*, 8 De G., M. & G. 391; see *Noel v. Henley*, Dan. 322.



A specific bequest of the general personal estate has also been held to show an intention to exonerate it (*d*). But where the testator specifically bequeathed the surplus of his personalty, computing it at a certain amount after payment of his debts, it was adjudged that the mortgage, as one of the debts, should be paid out of that fund, though it was thereby reduced below the amount specified (*e*).

**1135.** As to the expressions which will throw the burthen of the mortgage debt on the personalty of a testator, who was not liable to pay it, neither a general charge in his will for payment of debts (*f*), nor even a direction to pay them out of his personal estate (*g*), will be sufficient. And where a testator expressed by his will an intention to pay off part of the mortgage debt, but failed to do so, a direction that the intended balance should be paid out of a particular fund was held not to exonerate the mortgaged estate (*h*). But a devise of property upon trust for sale and payment of the mortgage debt, with a declaration that the mortgaged estate shall be held free from incumbrances, will exonerate it (*i*); and if the fund provided be insufficient, the balance must be made good by the residuary personalty in discharge of its primary liability, though that fund may also have been bequeathed free from debts. The mortgage debt has also been held to be adopted by a surety, so as to discharge the mortgaged estate, where he devised it to the principal debtor and directed that all monies payable out of it under the mortgage, should be discharged out of a fund which he provided for the payment of his debts (*k*).

(*d*) *Blount v. Hipkins*, 7 Sim. 50. But it seems that the principle last mentioned might have been applied; there being a trust to sell the residuary real estate for payment of debts, including the mortgages and a gift over of the surplus.

(*e*) *Hawes v. Warner*, 2 Vern. 477.

(*f*) *Lawson v. Hudson*, 1 Bro. C. C. 57; *Ancaster v. Mayer*, Id. 454.

(*g*) *Jenkinson v. Harcourt, Kay*,

688.

(*h*) *Lomax v. Lomax*, 12 Beav. 285; 13 Jur. 1064. See the effect of actual payment and an inaccurate receipt, *Lenwick v. Potts*, 8 De G., M. & G. 506.

(*i*) *Brooke v. Warwick*, 2 De G. & S. 425; 13 Jur. 547; 1 H. & T. 142.

(*k*) *Mushet v. Cliffe*, 12 Jur. 739; 17 L. J. (Ch.) N. S. 269; 2 De G. & S. 243.

**1136. (2) (b) (1122).** The statute called Locke King's Act (**1114**) does not affect the rights of a person who claims under a will dated before the 1st January, 1855, though it were republished by a codicil dated after that day, provided the claim be not wholly or in part under a devise which operates only by virtue of the republication (*l*); and notwithstanding the expression that the mortgaged hereditaments shall be primarily liable, as between the different persons claiming *through or under the deceased person*, the estate is liable, though the personalty be vested in the Crown, and not by a title derived through or under the deceased mortgagor; it being considered that this part of the clause only shows that the debt should be borne rateably, where it is charged on several estates (*m*) (**1142**). In case of intestacy, however, the heir of a mortgagor who has died after the 1st January, 1855, cannot have the benefit of the proviso in the act, on the ground that he takes under the limitation in the mortgage deed to the mortgagor and his heirs; because he takes immediately from his ancestor and not under the deed (*n*). Nor can an heir who takes an estate which is the subject of a lapsed devise, where, in the will in which it was contained, there was no other expression of a contrary or other intention within the acts, which could bring him within the description of a person claiming under or by virtue of a will (*o*).

**1137.** The act applies to copyholds as well as to freeholds (*p*), but notwithstanding the large signification of the words used in the first part of the act, leaseholds and chattels real are excluded by the latter part of it (*q*).

**1138.** As to the nature of the charge referred to, it applies as well to an equitable mortgage by deposit of title deeds (*r*),

(*l*) Rolfe v. Perry, 9 Jur., N. S. 853.

(*m*) Dacre v. Patrickson, 1 Dr. & Sm. 186.

(*n*) Piper v. Piper, 1 J. & H. 91; 6 Jur., N. S. 1026.

(*o*) Nelson v. Page, L. R., 7 Eq. 25.

(*p*) Piper v. Piper, *supra*.

(*q*) Solomon v. Solomon, 10 Jur., N. S. 331.

(*r*) Pembroke v. Friend, 1 J. & H. 132; Coleby v. Coleby, L. R., 2 Eq. 803.

as to a more formal or technical security; but it did not originally apply to the lien of a vendor for unpaid purchase-money (*s*).

This construction has been partly altered by an enactment (*t*), that the word "mortgage" both in the original and in the explanatory statutes is to extend to any lien for unpaid purchase-money upon hereditaments purchased by a testator; the case of purchase by an intestate remains unprovided for (*u*).

**1139.** The act does not affect a charge which does not form a defined and specific security on an ascertained estate. It therefore does not apply to a general charge upon real estate, in aid of personalty, to pay debts or legacies, until the amount of the charge has been accurately defined, and the devisee has taken the estate subject to it; at which time it will constitute a mortgage within the act (*x*).

The intention to exonerate the real estate only extends to the value of the fund made chargeable by the testator; if that fund be insufficient the residue must be borne by the mortgaged estate (*y*). And the act does not affect the rights of the parties where, in consequence of a provision by the testator of another fund for payment of the mortgage, there is no longer a question between the testator's general personalty and the devisee or heir of the mortgaged estate (*z*).

**1140.** It has been declared by the same explanatory statute (*a*), that in the will of any person who may die after 31st December, 1867, a general direction that the debts or all the debts of the testator shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary

(*s*) *Hood v. Hood*, 3 Jur., N. S. 684.  
See *Barnwell v. Iremonger*, 1 Dr. & S. 260.

(*t*) 30 & 31 Vict. c. 69, s. 2, passed 25th July, 1867. Sect. 1 applies only to the wills of persons who die after 31st December, 1867; but no express restriction is placed upon the operation of sect. 2.

(*u*) *Harding v. Harding*, L. R., 13 Eq. 493.

(*x*) *Hepworth v. Hill*, 30 Beav. 476; 8 Jur., N. S. 960.

(*y*) *Rodhouse v. Mold*, 35 L. J., Ch. 67.

(*z*) *Greated v. Greated*, 26 Beav. 621; *Allen v. Allen*, 30 Beav. 395.

(*a*) Sect. 1.

to or other than the rule established by the original act, unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt, charged by way of mortgage on any part of his real estate.

In this provision is adopted the view of Lord Campbell, that the land could only be relieved from the charge by an expression of intention, corresponding to that which under the old law would have relieved the personalty, viz., by words either expressing, or clearly indicating, that the fund made primarily liable by law was to be freed from the charge. And he therefore held (*b*), that a direction by a testator that his debts should be paid by his executors did not sufficiently show that the mortgaged estate was to be discharged. In other cases (*c*) directions that debts should be paid, or that they should be paid by the executors, out of the personal estate, had been held not to mark an intention to exonerate the mortgaged estate; though a devise of that estate in settlement, and of other real and leasehold estates, and personalty, to trustees for conversion and payment of debts and legacies, with a gift of the ultimate residue, was considered to be sufficient for the purpose (*d*).

Before the enactment, however, the construction adopted by Lord Campbell had been disapproved by several judges, as an extension, not warranted by analogy of the rule of the old law which was founded upon the favour shown to real estate, to the construction of a statute which proceeded upon a different principle (*e*); and it was held that the intention ought to be collected from the will or deed, according to the ordinary rules

(*b*) *Woolstencroft v. Woolstencroft*, 2 De G., F. & J. 347; 6 Jur., N. S. 1170, overruling the judgment of Stuart, V.-C., 2 Gif. 192; and see *Coote v. Lowndes*, L. R., 10 Eq. 376.

(*c*) *Pembroke v. Friend*, 1 J. & H. 132; *Rawson v. Harrison*, 8 Jur. 875.

(*d*) *Newman v. Wilson*, 31 Beav. 33.

(*e*) See judgments of Wood, V.-C., in *Mellish v. Vallins*, 2 J. & H. 194,

and 8 Jur., N. S. 864; and *Turner, L. J.*, in *Eno v. Tatam*, 3 De G., J. & S. 443; 9 Jur., N. S. 481; S. C. 4 Gif. 181; and see *Rolfe v. Perry*, 9 Jur., N. S. 853; 3 De G., J. & S. 481; *Porcher v. Wilson*, 12 W. R. 1001; *Smith v. Smith*, 3 Gif. 263; 7 Jur., N. S. 1140; *Moore v. Moore*, 1 De G., J. & S. 602; *Stone v. Parker*, 1 Dr. & S. 212.

of construction; not only from the words, but also from the effect of the dispositions contained in the whole instrument.

*Of Cases in which two or more Estates are liable to contribute to the Debt.*

**1141.** Having considered the circumstances under which the fund, which in the first instance is liable to the mortgage debt, retains or is exonerated from its primary liability, it remains to be observed, that, as between the mortgaged estates and other property of the owner of them, or as between different estates subject to the same mortgage, one part may become liable to contribute to the payment of the debt, either primarily, or by the deficiency of the estate or fund upon which the primary liability has been fixed.

The equities which thus arise between the different funds are adjusted under the doctrines of CONTRIBUTION and MARSHALLING, which are extensively applied, not only as between the owners of funds liable to the payment of mortgage debts, but also in the general administration of the assets of the deceased mortgagor, the consideration of which is beyond the scope of this work. These rights act reciprocally, and rest upon the principle that a fund, which is equally liable with another to pay the debt, shall not escape because the creditor has been paid out of that other fund alone; and on the other hand, that a creditor who has the means of satisfying his debt out of several funds, shall so exercise his right as not to take from another creditor or claimant the fund which forms his only security.

**1142.** Premising that the payment of the mortgage debt, from which the personal estate has been exempted, or which the personal estate, where it is the primary fund, is insufficient to satisfy, must in the next place be made out of estates which have been specially devised for payment of the mortgage or other debts of the person liable (*f*); then-out of descended

(*f*) *Powis v. Corbet*, 3 Atk. 556; *Tweedale v. Coventry*, 1 Bro. C. C. 240; *Phillips v. Parry*, 22 Beav. 279.  
*Donne v. Lewis*, 2 Bro. C. C. 257; *Bartholomew v. May*, 1 Atk. 487;

estates (*g*); and, failing these, out of estates specifically devised, but charged with the payment of debts (*h*); and then such as are comprised in a general or residuary devise (*i*): the effect of these equitable doctrines is shortly as follows:—

If several estates, whether of one or of several owners (*k*), be mortgaged for, or subject equally (and not one as surety or collateral security for the other (*l*)) to one debt; or, if the owner of several estates, having mortgaged one of them, charges his real estate with or devises it in trust for payment of his debts (*m*), and the estates descend or are devised to different persons (for the rule will not hold where they come to the same person (*n*)); and though one of them pass by a specific and the other by a residuary devise (*o*), the several estates shall contribute rateably to the debt; being valued for that purpose, after deducting from each estate any other incumbrance by which it is affected; and a vendor's lien being reckoned like any other incumbrance (*p*); and the right of contribution is not affected by Locke King's Act (*q*). So if one of the estates have been mortgaged for one debt and both of them for another, though the first shall bear exclusively its own debt, both must contribute rateably to that which is later; the amount of the first debt being deducted from the value of the estate which has paid it (*r*). And where the charge consisted of a life annuity, and the value of one of the estates charged was of a fluctuating nature, it was held that the

(*g*) *Galton v. Hancock*, 2 Atk. 424, 430; *Barnewell v. Cawdor*, 3 Mad. 453.

(*h*) *Davies v. Topp*, 1 Bro. C. C. 524; *Donne v. Lewis*, 2 Id. 257. See 3 & 4 Will. 4, c. 104.

(*i*) *Jarm. Wills*, 2, 588, ed. 3. See *Dady v. Hartridge*, 1 Dr. & S. 236; *Hensman v. Fryer*, L. R., 2 Eq. 627; *Rotheram v. Rotheram*, 26 Beav. 465; *Bethell v. Green*, 34 Beav. 302.

(*k*) See *Aldrich v. Cooper*, 8 Ves. 390; *Clarke v. Brereton*, 1 Jones, 165; *Johnson v. Child*, 4 Hare, 87.

(*l*) *Marquis of Bute v. Cunyng-hame*, 2 Russ. 275; *Stringer v. Harper*, 26 Beav. 33; 4 Jur., N. S. 1009.

(*m*) *Carter v. Barnadiston*, 1 P. W.

505; *Irvin v. Ironmonger*, 2 R. & M. 531; *Middleton v. Middleton*, 15 Beav. 450. See *Eyre v. Green*, 2 Col. 527.

(*n*) *Stronge v. Hawkes*, 4 De G. & J. 632.

(*o*) *Gibbins v. Eyden*, L. R., 7 Eq. 371; *Sackville v. Smyth*, L. R., 17 Eq. 153; notwithstanding *Brownson v. Lawrance*, L. R., 6 Eq. 1.

(*p*) *Barnwell v. Ironmonger*, 1 Dr. & S. 255.

(*q*) *Sackville v. Smyth*, *supra*; notwithstanding *Brownson v. Lawrance*, *supra*.

(*r*) *Lipscomb v. Lipscomb*, L. R., 7 Eq. 501; *De Rochefort v. Dawes*, Id., 12 Eq. 540.

contribution must be from year to year, according to the actual income in each year (*s*).

**1143.** But the right of contribution will be prevented by the right of marshalling from being applied against an estate which is liable to other creditors of the debtor (*t*); or which not being charged with his debts, and even though consisting of leasehold and other personalty, is liable under a specific or pecuniary, as distinguished from a residuary, bequest; the devisee in such cases being obliged to take the mortgaged estate as he finds it (*u*). And so if one of several estates charged with the payment of debts be expressly made liable to the payment of a mortgage debt to which it is subject, it will not be liable to contribute with the other estates to the general charge (*x*).

**1144.** By the sale of part of an incumbered estate with a covenant against incumbrances, the burden is thrown upon the residue in favour of the purchaser; and if part of the estate have been given in exchange, the equity is the same as if it had been sold for money, and no liability is thrown upon the land received in exchange (*y*).

**1145.** If a person bound to elect between two estates have mortgaged one of them before election, and afterwards elect to take the other, the first must be taken subject to the mortgage, but shall be exonerated by the other (*z*).

**1146.** An insurance office, by the rules of which a policy will become void upon the suicide of the insured, except to the extent of any interest acquired for valuable consideration or by way of security, holds out that the owner of such an interest will be entitled to payment; and, being a principal debtor in

(*s*) *Ley v. Ley*, L. R., 6 Eq. 174.

(*t*) *Bartholomew v. May*, 1 Atk. 487.

(*u*) *O'Neal v. Mead*, 1 P. W. 694;  
*Davis v. Gardiner*, 2 P. W. 190; *Wythe v. Henniker*, 2 M. & K. 635; *Halliwell v. Tanner*, 1 R. & M. 633; *Cope v. Cope*, 2 Salk. 449. See *Symons v.*

*James*, 2 Y. & C. C. C. 301.

(*x*) *Wisden v. Wisden*, 2 S. & G. 396; 18 Jur. 1090.

(*y*) *Kirkham v. Smith*, 1 Ves. 257; see *Lloyd v. Johnes*, 9 Ves. 64, as to the effect of a sale by the court.

(*z*) *Rumbold v. Rumbold*, 3 Ves. 65.

respect of the policy, has no equity in case of the suicide of an insured person who has mortgaged the policy with other property, and in the absence of fraud, to come upon that property for contribution (a). *See Addenda* ~~IIa~~ ~~XXXX~~.

1147. There is no equity between the representatives of a lunatic, which confers a right to call for the restoration to one estate or fund, of money which has gone or been applied in relief of another. A charge on the lunatic's real estate, which devolves upon him as personal representative of the owner of it, will therefore sink for the benefit of his heir (b). And where a lunatic was seised of estate A. ex parte paternâ, and ex parte maternâ of B., which was mortgaged, and the produce of timber cut upon A. was applied in discharge of the mortgage, it was held that A. should not be recouped (c).

There appears to be no certain rule as to the rights of the real and personal representatives of the lunatic, when the mortgage has been paid off out of his personal estate by the direction of the court. It seems to have been considered by Lord St. Leonards (d), after an elaborate review of the authorities, that if the court, in the exercise of a prudent management, ordered payment of the charge out of the lunatic's property, derived from savings out of the real estate, the heir ought to hold free from the charge. But where a mortgage debt, which had been contracted by the ancestor of the lunatic (whose personalty was therefore not liable to it), was discharged out of his personal estate, the Court of Appeal in Chancery ordered the amount to be raised out of the mortgaged estate, and to be paid to the administratrix (e).

When, under the Lunacy Act of 1853, money advanced

(a) *Solicitors and General Life Assurance Society v. Lamb*, 1 H. & M. 716; 2 De G., J. & S. 251; 10 Jur., N.S. 739.

(b) *Compton v. Lord Oxenden*, 4 Bro. C. C. 396; 2 Ves. J. 261.

(c) *Anon.*, cited by Lord Eldon in *Phillips, Exp.*, 19 Ves. 123.

(d) *Lord Leitrim v. Enery*, 6 Ir. Eq. R. 355; following *Grimstone, Exp.*, Ambl. 706; *Hinde, Exp.*, id. n.

(e) *Leeming, Re*, 3 De G., F. & J. 43; 7 Jur., N. S. 115; and see *Sergeson v. Sealy*, 2 Atk. 414; *Broomfield, Exp.*, 3 Bro. C. C. 515; *Clayton, Exp.*, 1 R. & M. 369; *Hinde, Exp.*, Ambl. 706, Mr. Blunt's note and cases there; *Degge, Re*, 4 Bro. C. C. 236; and *Shelf, Lun.* 304, ed. 2, and other cases cited there.



for the permanent improvement, security or advantage of the lunatic's land, and which is to be a charge upon and raiseable out of the lunatic's interest in the land, is paid out of the lunatic's general property, the charge may be made to some person as a trustee for him, as part of his personal estate (*f*). And when under the same act (*g*) money raised out of land or stock has been applied to any of the purposes there mentioned, which include the discharge of any incumbrance upon the lunatic's estate, the person whose estate is mortgaged and his real and personal representatives have the like interest in the surplus monies after the purposes of the security have been answered, as if no mortgage had been made; and the surplus monies are declared to be of the same nature and character as the estate mortgaged.

If the estate intended to be charged be entailed, the entail will not be barred further than is necessary for the purposes of the security, and it will be so expressed in the deed; and the mortgage will be made only for a term of years, and without any power of sale (*h*) (423).

A provision in a mortgage deed, executed under the authority of the statute, that a certain estate shall be the primary fund, will not affect the subsequent operation of the will of the lunatic, made before the lunacy, and by which other estates have been specially devised for the payment of debts (*i*).

**1148.** If the personal estate of an infant be applied in payment of his mortgage debt, the debt will also be kept alive as personal estate (*k*).

*Of Cases in which incumbered and other Estates will be  
marshalled.*

**1149.** The doctrine of marshalling as between incumbrancers on several estates, which are also subject to one security, enables the incumbrancer with one fund to control,

(*f*) 16 & 17 Vict. c. 70, s. 118.

(*g*) Id. s. 119.

(*h*) Pares, Re, L. R., 2 Ch. Div. 61.

(*i*) Freeman v. Ellis, 1 H. & M. 758.

(*k*) Per Lord Hardwicke, *Leys v. Price*, 9 Mod. 221; per Lord Eldon, *Phillips, Exp.*, 19 Ves. 122; see *Chambers on Infancy*, 565, &c.

for his own benefit, the application of the securities of another who has several; and to that extent gives an interest in those securities to the holder of the single fund; as a subsequent mortgagee of one estate, who pays off the prior mortgage upon the same and another estate, makes them both applicable for his own original debt. But the doctrine of marshalling is of an entirely different nature from the right of the subsequent mortgagee to throw his own debt upon an estate not originally made liable to it, but comprised in the security of a prior mortgagee (1033). The latter right depends upon the *puisné* mortgagee's redeeming the earlier one, and so getting the benefit of his securities. It is an equity arising out of the act of redemption (1), and when acquired enables the *puisné* mortgagee to hold both estates, with all the rights which the prior mortgagee had whom he redeemed.

1150. If the owner of two estates mortgage them both to one person, and then one of them to another, without notice, the second mortgagee may insist, under the doctrine of marshalling, that the debt of the first shall be satisfied out of the estate not mortgaged to the second, so far as that will extend (m). And *à fortiori* he may do this, if there be a covenant or declaration in the second mortgage that the estate is free from incumbrances (n). He may also gain his end by means of redemption, *i. e.*, by paying off the prior mortgagee, and stepping into his place. In the one case, the first mortgagee's debt is primarily thrown upon the estate not in mortgage to the second; in the other, the second mortgagee throws upon both estates his own debt, which by contract was only charged upon one of them. But while by redemption he may throw his own debt upon both estates, not only in the simple case of two mortgages above supposed, but also (so long as the prior mortgagee retains both of the estates which form his security) where there are subsequent incum-

(1) *Titley v. Davies*, 2 Y. & C. C. C. 404.

(m) *Lanoy v. Duke of Athol*, 2 Atk. 444; *Aldrich v. Cooper*, 8 Ves. 381; *Tidd v. Lister*, 10 Hare, 140, 157; 18

Jur. 543; and 3 De G., Mac. & G. 857; *Gibson v. Seagram*, 24 L. J. (Ch.) N. S. 782; 20 Beav. 614.

(n) *Averall v. Wade*, Ll. & G. temp. Sugd. 259.

branches upon either or both of the estates, and against the subsequent incumbrancers, his means of relief under the doctrine of marshalling are far more limited, for the reason that equity refuses to marshal securities, where in aiding one incumbrancer it would injure another (*o*).

Thus if estates X. and Y. be mortgaged first to A. and secondly X. be mortgaged to B., and thirdly Y. to C. (*p*); or if X. be mortgaged to A., secondly to B., and thirdly X. and Y. again to A., to secure the original debt and a further advance, and fourthly X. and Y. to C. (*q*) (1783): here in either case A. may resort for his whole debt either to X. or Y. Now, if A. be compelled to take his debt exclusively from Y., X. will be left free for B., but at the expense of C. But this would clearly be inequitable; for even if C. had notice when he took his security, he had notice of no more than that A. had a security upon Y. (*r*); and he ought not to lose the benefit of his contract in favour of B., who claims under no contract against that estate. B. having lent his money on estate X. only, and having taken no charge upon or covenant respecting Y., has no more than a potential equity, as it has been called, against that estate, which by means of the subsequent security given to C. was prevented from fully arising. He has no equity to prevent the mortgagor from pledging estate Y. to C.; none to prevent A. from giving up his security upon it, and so depriving B. even of his chance of getting a title by redeeming A. The only equity which he has is in respect of so much as the mortgagor had not alienated for value.

Yet if, in such a case, the court refused all interference,

(*o*) *Aldrich v. Cooper*, 8 Ves. 382; *Averall v. Wade*, Ll. & G. temp. Sugd. 252; *Dolphin v. Aylward*, L.R., 4 E. & I. App. 486. The Court of Admiralty, notwithstanding this principle, has marshalled in favour of a master's claim for wages, against the owners of the cargo; on the ground that the master, who was deprived of the ship and freight by his personal contract to pay the wages, had made no such contract

with the owners of the cargo. *See qu.* *Edward Oliver*, L. R., 1 Ad. 379.

(*p*) *Bugden v. Bignold*, 2 Y. & C. C. C. 377.

(*q*) *Barnes v. Racster*, 1 Y. & C. C. C. 401.

(*r*) A purchaser is not bound to take notice of all the equities arising out of a particular deed or suit. (*Averall v. Wade*, *supra*; *Shalcross v. Dixon*, '7 L. J., N. S., Ch. 180.)

lest C., the third incumbrancer, should lose his security, it would expose B., the *mesne* mortgagee, to the like injury; for if A. were left to take his whole debt out of estate X., the second mortgagee, B., would lose his security; whilst to the third, C., who has no better equity, and is later in time, estate Y. would be left open. Therefore, in ordinary cases, the court will throw the debt of A. upon both his securities, rateably according to their value, and so will leave the residue of each to satisfy the subsequent incumbrancer, to whom it was specifically mortgaged (*s*). But if C. take by his contract only the surplus which will remain after satisfying the earlier mortgagees, the marshalling will take place between them, without regard to his interests (*t*).

And if the third incumbrancer be only a judgment creditor, or take his security *pendente lite*, and the second claimant for valuable consideration have a declaration or covenant that the estate is free from incumbrances, he shall be protected, and shall have the advantage of marshalling; and in his favour the prior incumbrancer shall be thrown upon the estate which is not liable to the second; whose security shall not contribute for the benefit of the third (*u*). The estate of the second incumbrancer having once acquired the right to be indemnified at the expense of the other, his right is not to be disturbed by a subsequent judgment creditor or person who, taking subject to the same equities as the debtor (1083), is not in the situation of a purchaser for valuable consideration without notice, and cannot oblige the *mesne* incumbrancer to pay off debts against which the mortgagor covenanted to exonerate his estate. The like has been held (*x*) in favour of the tenant in tail under a settlement made by the mortgagor for valuable consideration, in which he had covenanted to exonerate the

(*s*) *Barnes v. Racster*, 1 Y. & C. C. 401; *Bugden v. Bignold*, 2 Y. & C. C. 377; *Titley v. Davies*, id. 399; and see *Gibson v. Seagrim*, 20 Beav. 614; 24 L. J. (Ch.), N. S. 782; and *Liverpool Marine Credit Co. v. Wilson*, L. R., 7 Ch. 512.

(*t*) *Mower's Trusts*, Re, L. R., 8 Eq. 110.

(*u*) *Averall v. Wade*, Ll. & Goo. temp. Sugd. 252; *Going v. Farrell*, Beat. 472.

(*x*) *Hughes v. Williams*, 3 Mac. & G. 683; 16 Jur. 415; *Chappell v. Rees*, 1 De G., Mac. & G. 393.

settled estates from incumbrances, where the bills were filed by the judgment creditor and by the assignees in insolvency of the mortgagor and settlor; so that this distinction must be considered to be founded upon the circumstance that the subsequent incumbrancer or assignee of the mortgagor is not in the position of an assignee for valuable consideration without notice, but is subject to all the equities and liabilities of the person under whom he claims; and the rule as concerns innocent purchasers remains unaffected (*y*).

**1151.** Where the subsequent incumbrancer is in the position of an assignee for valuable consideration without notice, or without such notice as will fix him with the equity arising out of the covenant with the earlier mortgagee (*z*), it is considered that the latter would not be entitled to exoneration against the subsequent incumbrancer, though he would have been so against the mortgagor, if he had remained the absolute owner of the estate subsequently mortgaged. And when the mortgagees are appointees under a power, it is clear that there would be no exoneration against the later incumbrancer, any more than there would be against the persons who would have taken in default of appointment (*a*).

**1152.** It has also been held, that where an estate is settled subject to judgments created by the tenant for life, arrears of interest on such judgments may, as against the remainderman, be thrown upon that estate, in favour of a judgment creditor of the tenant for life after the settlement, who can only resort to an unsettled estate (*b*).

**1153.** A surety is entitled to the benefit of the right of marshalling (*c*) (1343). And it has been determined that where the vendee of goods, which have been purchased but not paid for, has indorsed over the bill of lading for valuable

(*y*) See Sugd. V. & P. 1028, ed. 11; 632.  
746, ed. 14.

(*b*) Fox, Re, 5 Ir. Ch. R. 541.

(*z*) 1150; note (*r*).

(*c*) Hayman v. Dubois, L. R., 13 Eq.

(*a*) Strong v. Hawkes, 4 De G. & J. 158.

consideration by way of pledge only, the vendor having a right to enforce his lien by stoppage in transitu (1371), subject to the security, becomes as to his interest in the goods a surety to the indorsee for the vendee's debt; and may therefore compel the indorsee to have recourse for the payment of his debt to other goods pledged to him by the vendee, or to the proceeds arising from the sale of them, in ease of his own liability as surety (*d*).

But, as in the case of the mortgagee's right to hold several securities (1043), his equity of marshalling overrides the right of the surety to have the benefit of all securities for the debt which he has discharged, where he has not entered into a contract which will prevent the mortgagor from conferring upon a puisné mortgagee of one of the estates the ordinary right to have the securities marshalled (*e*).

If a consignee or other agent pledge his principal's goods with his own for his own debt, the pledgee will be compelled to resort in the first instance to the agent's goods (*f*).

**1154.** Marshalling may be enforced where the mortgaged estates have descended upon different persons (*g*); also where the debtor has become bankrupt (*h*), because the assignee stands in his place, and is bound in all respects as he is; and in favour of an incumbrancer whose charge is only voluntary (*i*). And if the mortgages be by the husband and wife, of the wife's estates, the mortgagee whose security is only upon one estate is entitled to marshal against the wife surviving (*k*).

**1155.** A mortgagee may resort to funds not comprised in his security, where that has been swept away by a landlord under a distress for rent (*l*), or by the Crown under an ex-

(*d*) *Westzinthus*, Re, 5 B. & Ad. 817; 2 N. & M. 644.

(*e*) *South v. Bloxam*, 2 Hem. & Mil. 457; 11 Jur., N. S. 319; 34 L. J., N. S., Ch. 369.

(*f*) *Broadbent v. Barlow*, 3 De G., F. & J. 570; 7 Jur., N. S. 479; *Alston*, Exp., L. R., 4 Ch. 168.

(*g*) *Lanoy v. Atholl*, 2 Atk. 446,

(*h*) *Baldwin v. Belcher*, 3 Dru. & War. 173; *Hartley*, Exp., 1 Dea. 288; 2 M. & A. 496.

(*i*) *Aldridge v. Forbes*, 9 L. J., N. S., Ch. 37; 4 Jur. 20.

(*k*) *Tidd v. Lister*, 10 Hare, 140, 157; 18 Jur. 543.

(*l*) *Stephenson*, Exp., De G. 586.

tent (*m*): and the Crown itself has been compelled to resort to the real estate, that other creditors, to whom the personality alone was liable, might not be disappointed (*n*).

**1155a.** If the paraphernalia of a widow be taken by the mortgagee, under his bond or covenant, she will be held to be a creditor for their value against the mortgaged estate (*o*).

**1156.** The mortgagee who takes a security upon part of an estate, the whole of which is subject to debts, legacies or other charges, is entitled, as against the mortgagor, to throw those charges upon the part not mortgaged to him (*p*); and the mortgagee of the chattels of a bankrupt, which having been left in the bankrupt's possession were seized and sold by the landlord under a distress for rent, was held entitled to marshal against the assignees of the bankrupt mortgagor, so as to throw the debt of the landlord exclusively upon property not subject to the mortgage (*q*). The mortgagee may also marshal against a purchaser of the whole estate without notice of the mortgage, who, taking the estate, with all the equities to which it is subject, is bound by this equity of the mortgagee to be paid out of the whole estate, after satisfaction of the charges (*r*).

**1157.** The courts apply the doctrine of marshalling not merely before the debt of the mortgagee or creditor who has the double fund has been paid (*s*); but if he be already satisfied, they permit the disappointed creditor to stand in his place, against the estate upon which the creditor with the double fund would otherwise have been thrown, for the amount which he has taken out of the subsequent creditor's security. And this will equally be done, where the single fund was applied for convenience by the order of the court itself (*t*). But the court will

(*m*) *Aldrich v. Cooper*, 8 Ves. 382.

(*n*) *Sagittary v. Hyde*, 1 Vern. 455.

(*o*) *Aldrich v. Cooper*, 8 Ves. 382;  
*Tipping v. Tipping*, 1 P. Wms. 730.

(*p*) *Haynes v. Forshaw*, 17 Jur. 930;  
11 Hare, 98.

(*q*) *Stephenson, Exp.*, 17 L. J., Bank.  
(N. S.) 5; 12 Jur. 6; De G. 586.

(*r*) *Finch v. Shaw*, 18 Jur. 935; 19  
Beav. 500; 5 H. L. C. 905; 3 Jur.,  
N. S. 25.

(*s*) *Aldrich v. Cooper*, 8 Ves. 382;  
*Trimmer v. Bayne*, 9 Ves. 209; see  
*Wake v. Wake*, 17 Jur. 545.

(*t*) *Gwynne v. Edwards*, 2 Russ.  
289, note.

neither interfere with the first mortgagee's right to take his debt out of that part of his security which first becomes available, upon the ground that other funds are comprised in his security (*u*); nor compel him, when he is executor of the mortgagee, to apply the personalty as it comes to his hands in discharge of the debt (*x*).

**1158.** A pecuniary legatee is entitled to stand against the devised estate, to the extent to which a mortgagee has been paid out of the personalty (*y*); and so he is when the vendor of the estate has been paid out of the purchaser's personalty, the effect of the lien and of the mortgage being in this respect alike (*z*).

**1159.** The right of marshalling rests upon the general principles of equity in the administration of property, and has been held to be unaffected by the circumstance, that one of the funds to which the prior creditor could resort, was inapplicable to the payment of the debt of the creditor who sought the aid of the equity (*a*).

Nor can it be successfully argued against the right to marshal, that the fact of the several securities having become vested in the holder of them by distinct transactions, shows that the one was meant to be liable only in case the other were deficient; since it is clear, that the possession of both gives the owner of them a right to go against both or either for his whole debt (*b*).

**1160.** It might have been thought unnecessary to remark, that the principle of marshalling can have no application where there is no question as to the sufficiency of the single

(*u*) *Wallis v. Woodyear*, 2 Jur., N. S. 179.

(*x*) *Binns v. Nichols*, L. R., 2 Eq. 256.

(*y*) *Forrester v. Leigh*, Amb. 171; *Wythe v. Henniker*, 2 M. & K. 635; see *Rider v. Wagner*, 2 P. W. 334.

(*z*) *Pollexfen v. Moore*, 3 Atk. 272; *Selby v. Selby*, 4 Russ. 386; *Sproule*

*v. Prior*, 8 Sim. 189; *Birds v. Askey*, 24 Beav. 619; *Lord Lilford v. Powys Keck*, L. R., 1 Eq. 347; 35 Beav. 77; notwithstanding *Wythe v. Henniker*.

(*a*) *Greenwood v. Taylor*, 1 Russ. & M. 187; *Aldrich v. Cooper*, 8 Ves. 382.

(*b*) *Gwynne v. Edwards*, 2 Russ. 289.



fund, if such a proposition had not been attempted to be established. There being a first mortgage of estate X. to M.; secondly, a mortgage of the equity of redemption of X., and of estates Y. and Z. to C., and then a sale of Y. and Z. to G., who also became the assignee of C.'s mortgage, and filed a bill seeking to redeem the assignees of M., and to foreclose the mortgagor: the assignees of M. insisted, that to give them the benefit of an equitable lease of X., made after the second mortgage of that estate to C., estate X. should not be sold (the case arose in Ireland), until after the sale and application of the produce of Y. or Z. But they were answered, that marshalling went on the ground of insufficiency; but that here the person having the double fund was offering to redeem the owner of the single fund; which could not be done without paying him off (c).

The attempt here was to use the doctrine of marshalling, to set up against the second mortgagees a lease, which was made subject to their security.

**1161.** Maritime securities will be marshalled so far as may be consistent with the rules of maritime priority; a qualification which enables the owner of a cargo which is included in a bottomry bond, with the ship and freight, to resist a claim to throw the debt upon the cargo, for the purpose of leaving the ship and freight to satisfy the debt of another bondholder, whose security was confined to them: because by the maritime law the cargo is not liable until the ship and freight are exhausted (d) (122).

And demands for wages, pilotage and towage, to which the ship and freight are liable *pro rata*, will not be thrown upon the freight, for the benefit of a bondholder on the ship only, so as to prejudice the owner of the cargo, by diminishing the residue of the freight which would otherwise be available for another incumbrancer upon the cargo (e). Nor will

(c) *Gregg v. Arnott*, L. & Goo. temp. Sugd. 248.

(d) *Priscilla*, 1 Lush. 1; 5 Jur., N. S. 1421; see *Mary Ann*, 9 Jur. 94; *La*

*Constancia*, 2 W. Rob. 404; *Edward Oliver*, L. R., 1 Ad. 379.

(e) *La Constancia*, 2 W. Rob. 460.

the equity be applied where both funds are not under the control of the court. Therefore, seamen will not be compelled to proceed on their personal remedy for wages, against the ship owner, that the ship may be left to satisfy the bondholder (*f*).

**1162.** It is not necessary to frame the pleadings in an action expressly for marshalling. When the court sees at any time that one class of creditors will be deprived of their debts by the claims of another class upon their fund, it will, without being called upon, direct the assets to be marshalled (*g*).

(*f*) Arab, 5 Jur., N. S. 417.

see Shephard v. Beane, W. N. 1876,

(*g*) Gibbs v. Ongier, 12 Ves. 416; 96.

## CHAPTER IX.

### OF THE DISCHARGE OF THE SECURITY.

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PART 1.—OF REDEMPTION.

PART 2.—OF RELEASE.

PART 3.—OF MERGER AND WAIVER.

PART 4.—OF NEGLIGENCE AND FRAUD.

PART 5.—OF THE LOSS OR DESTRUCTION OF THE SECURITY.

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#### PART I.

**1164.** *Of the Nature and Exercise of the Right of Redemption.*

**1177.** *Of the Defences to the Claim to redeem.*

**1186.** *Of the Time for Redemption.*

**1208.** *Of the Persons entitled to redeem.*

**1222.** *The Wife and the Surety of the Mortgagor.*

**1225.** *Joint Tenants, &c.*

**1227.** *Tenants in Tail and Remaindermen, and Tenants for Life, in Jointure, Dower, and Curtesy.*

**1234.** *Guardians and Committees.*

**1236.** *In Cases of Forfeiture and Escheat.*

**1238.** *Assignees.*

**1243.** *Judgment and other Creditors.*

**1249.** *Trustees in Bankruptcy.*

**1250.** *Devisees.*

**1251.** *Real and Personal Representatives.*

**1264.** *Members of Benefit Building Societies.*

**1272.** *Of the Payment or Satisfaction of the Debt.*

**1163.** A security may be wholly or partly discharged by redemption or release ; by the merger or waiver of the security or the debt ; by the negligence or fraud of the incumbrancer or his agent ; or by the loss or destruction of the subject of the security.

#### *Of the Nature and Exercise of the Right of Redemption.*

**1164.** The right to redeem a legal mortgage is usually vested in the mortgagor, by a proviso or condition, to the effect that if the mortgagor or his representative shall pay

to the mortgagee or person entitled to receive the debt the principal sum, with interest at the rate fixed, on a certain day, the mortgagee, or person in whom the estate is vested, will, at the cost of the person redeeming, reconvey to him, or as he shall direct.

The construction of such a proviso by courts of law is thus shortly expressed by Littleton (*a*):—"If a feoffment be made, upon such condition that if the feoffor pay to the feoffee at a certain day, &c., 40*l.* of money, that then the feoffor may re-enter, . . . if he doth not pay, then the land, which is put in pledge upon condition for the payment of the money, is taken from him for ever" (*5*).

The legal rule is the same where chattels are mortgaged, but differs where they are only pledged (*b*); for by breach of the condition the absolute property in the pledge does not vest in the pledgee, and the pledgor's right to redeem at law is not affected (*7*).

**1165.** The absolute loss to the mortgagor of the estate was formerly the irremediable consequence of non-payment of the mortgage debt at the time appointed; and the legal rule still exercises an important influence in the various relations which arise between the mortgagor and the mortgagee. But its harsh effect was long since removed by the Court of Chancery (*c*), which, holding that the security of the mortgage debt and not the exact performance of the condition was the object of the transaction, has enabled the owner of the estate subject to the debt to redeem during an extended period, upon the equitable terms of paying the mortgagee his principal, with interest to the time of payment, and his costs; unless the period for redemption has been anticipated by the decree of

(*a*) Sect. 332, and see *Bac. Abr.* Mortgage, 637.

(*b*) *Glanvill*, book 10, cc. 6, 8; *Story*, *Bail.* §§ 345, 346; *Com. Dig.* 5, 149.

(*c*) The County Courts Act, 1865 (28 & 29 *Vict. c.* 99), enables county courts to exercise all the power and authority of the Court of Chancery in suits for foreclosure or redemption, or

for enforcing any charge or lien, where the mortgage charge or lien shall not exceed in amount the sum of 500*l.* The jurisdiction of the county courts and the Court of Chancery, in such matters, is concurrent (*Brown v. Rye*, *L. R.*, 17 *Eq.* 343); notwithstanding *Simons v. M'Adam*, *L. R.*, 6 *Eq.* 324.

the court made at the instance of the mortgage creditor, and by which the mortgagor is required to redeem at a certain day, or in default is foreclosed of his equity of redemption: or unless the equity has been shut out by a sale of the estate, either made in pursuance of a decree, or by the mortgagee himself under a power contained in his mortgage.

**1166.** This right or equity of redemption has been described sometimes as an estate (*d*) and sometimes as an interest (*e*), or equitable right inherent (*f*) in the land; and though strictly equitable, and formerly capable of being enforced in equity alone, it was of so much consequence in the eye of the law, that the law took notice of it, and allowed it to be assigned and devised (*f*). Like the estate itself, it passes by transfer and devise; may be impressed with, and then becomes subject to, the ordinary consequences of entails and other limitations; devolves, according to the tenure of the actual estate, upon the real or personal representatives of the owner; and is subject to gavelkind, borough English and other customs which affect the ordinary legal ownership (*g*).

**1167.** The existence of a right of redemption does not necessarily depend upon any distinct agreement, but may be inferred from the nature of the transaction. It arises where property, or the evidences of property, have been transferred as a security for the payment of money, or have come to the hands of a person subject to a condition to the like effect (**13**); and where the nature of the transaction is doubtful, the intention of the parties may sometimes be shown by extrinsic evidence, or may be ascertained by a jury (*h*).

**1168.** The person who seeks redemption must show a good

(*d*) *Casborne v. Scarfe*, 1 Atk. 603. But it formerly would not enable the owner to support an action for an injury to the reversion of the mortgaged hereditaments. (*Mumford v. Oxford, Worcester and Wolverhampton Railway Co.*, 1 H. & N. 34.)

(*e*) *Lloyd v. Lander*, 5 Mad. 290.

(*f*) Per Hale, C. B., in *Pawlett v. A.-G.*, Hardres, 465, 469.

(*g*) *Anon.*, 2 Ch. Ca. 8; *Fawcett v. Lowther*, 2 Ves. 304; *Blake v. Foster*, 2 Ba. & Be. 387.

(*h*) *Wynne v. Styan*, 2 Ph. 303.

right to redeem, the mortgagee being entitled to hold the estate against all who cannot do so (1282); and if the defendant can make out a case which goes directly to show that the title is in another person than the plaintiff, the latter will not even be suffered to redeem at his peril (*i*). But a plea in bar to a redemption bill, on the ground of want of interest in the plaintiff, was held bad, where the mortgagor had parted with his interest in the security to an assignee, for whose benefit he was seeking redemption; though the assignee must be a party to such a suit (*k*).

**1169.** The mortgagor will not be allowed in a redemption suit to contest the mortgagee's title before redeeming (*l*). But if the right to redeem be fairly dependent on the validity of an instrument, there will be no declaration as to the terms of redemption until the question of validity has been settled (*m*). When the jurisdictions were separate, the course was to grant a trial to settle the right where a presumptive adverse title to the equity was made out (*n*); but not so as to enable a defendant who had produced no evidence of his own title to contest the plaintiff's claim (*o*).

The court will act upon a *primâ facie* title shown by the plaintiff, however complicated, if it be supported by satisfactory evidence, and be uncontradicted, except by a mere allegation or an adverse claim; considering that the only matter determined is the right of redemption, the judgment for which will not hinder an adverse claimant from asserting his title in another proceeding (*p*).

**1170.** A mortgagee whose claim is prior to that of the plaintiff and whose title is not impeached, can only be brought before the court for the purpose of redemption; and the action

(*i*) *Lomax v. Bird*, 1 Vern. 182; see *Francklyn v. Fern*, Barn. Ch. 30.

(*k*) *Winterbottom v. Tayloe*, 2 Drew. 279.

(*l*) *Smith v. Valence*, 1 Rep. in Ch. 90.

(*m*) *Blake v. Foster*, 2 Ba. & Be. 387.

(*n*) *Lomax v. Bird*, 1 Vern. 182.

(*o*) *Lloyd v. Wait*, 1 Ph. 61.

(*p*) *Lloyd v. Wait*, *supra*; *Pym v. Bowreman*, 3 Sw. 241, note; and see 2 Hare, 118, note (*b*).

of any person entitled to redeem, whether the title be by devise, assignment, judgment or otherwise, and though it touch only part of the mortgaged estate, is demurrable on the part of the prior mortgagee, unless it contain, expressly or in substance, an offer or prayer to redeem him (*q*) (1455). It has, however, been laid down that where a mortgagee is made party to a suit, the prayer for relief amounts to a prayer for redemption; because redemption is the proper relief, and dismissal will be the penalty of non-payment upon the account being taken, just as if redemption had been specially prayed (*r*) (1780). And it is not the less a suit for redemption because it seeks to set aside a sale by the mortgagee, which the plaintiff alleges to be void (*s*). If, however, the suit be for purposes inconsistent with redemption, it cannot be set up as a redemption suit, even, it seems, if an offer to redeem be made at the bar (*t*). The rule, that the suit must be framed for redemption, is the same when a decree for sale, and not for foreclosure, is sought; as has been laid down in reference to the practice in Ireland (*u*). And also where the plaintiff is a trustee; because the act of the mortgagor in creating a trust ought not to change the mortgagee's rights; and the trustee incurs no personal responsibility, except by dismissal with costs, in case of non-payment at the proper time (*v*). And so where the suit is for the administration of trust property, though part of the trust estate has been improperly included in the mortgage (*x*).

It has been doubted (*y*) whether, if there were no offer to redeem, where redemption is necessary, a dismissal of the action would, according to the usual course of practice, have the effect

(*q*) *Burrowes v. Molloy*, 2 Jo. & Lat. 521; *Dalton v. Hayter*, 7 Beav. 313; *Inman v. Wearing*, 3 De G. & S. 729; *M'Donough v. Shewbridge*, 2 Ba. & Be. 555; *Tasker v. Small*, 3 Myl. & Cr. 63; *Pearse v. Hewitt*, 7 Sim. 471; *Gordon v. Horsfall*, 11 Jur. 569; 5 Moo. P. C. 393; *Jervis v. Berridge*, L. R., 8 Ch. 358.

(*r*) *Cholmley v. Countess Oxford*, 2 Atk. 267; *Palk v. Clinton*, 12 Ves. 48.

(*s*) *Powell v. Roberts*, L. R., 9 Eq. 169.

(*t*) *Gordon v. Horsfall*, 5 Mo. P. C. 393; 11 Jur. 569; *Cranver, &c. Co. v. Willyams*, 35 Beav. 353.

(*u*) *M'Donough v. Shewbridge*, 2 Ba. & Be. 555; and see *Foster v. Ker*, 12 Ir. Eq. R. 54.

(*v*) *M'Donough v. Shewbridge*, 2 Ba. & Be. 555.

(*w*) *Eaton v. Hazel*, 1 W. R. 87.

(*y*) *Inman v. Wearing*, 3 De G. & S. 734.

of foreclosure (1780). But it is submitted that such a doubt ought not to prevail; for the offer to redeem is merely a matter of form. If the bill make a case for, without praying redemption, the court will give leave to amend (*z*), and will not even listen to the objection if made for the first time at the hearing, but will supply the omission, obliging the plaintiff to undertake to redeem according to the usual course (*a*). But the rule that foreclosure shall follow dismissal upon non-redemption is a substantial right belonging to the mortgagee, corresponding to his right to foreclosure upon non-redemption where he is himself the plaintiff, and ought not to be affected by the mortgagor's omission to make a formal offer to perform the condition, upon the performance alone of which the court gives him relief.

1171. The action must, however, relate to the very estate which is comprised in the security; for if it relate to different property, which has been made subject to or mixed up with the mortgage debt, by a deed to which the mortgagee was no party, and the suit cannot be effectual without his presence, he may be joined without any offer to redeem him. Therefore where estates had been conveyed upon trust to sell, and pay off the mortgage debt, so as to exonerate the mortgaged estate, and it was charged that the mortgagee claimed an interest in the trust estate, it was held (*b*) to be unnecessary to offer to redeem him. And the prior mortgagee, if he be a necessary party in respect of accounts, may waive the redemption of his security, in which case the decree should be prefaced by a statement that he consents not to be redeemed, and to allow his debt to remain a charge upon the estate (*c*).

1172. The offer to redeem is unnecessary, where by the concurrence of the mortgagee in a deed by which the estate is vested in trustees for payment of the incumbrances, and subject thereto upon trusts affecting the equity of redemption, another relation than the simple one of mortgagor and mortgagee has

(*z*) *Palk v. Clinton*, 12 Ves. 49.

(*a*) *Balfe v. Lord*, 2 Dr. & War. 480.

(*b*) *Dalton v. Hayter*, 7 Beav. 313.

(*c*) *Lord Kensington v. Bouverie*,

19 Beav. 39.



been created. In such a case a person who acquires a subsequent interest in the equity of redemption, whether by way of mortgage or judgment, may sue for an account and for the execution of the trust; joining the prior mortgagee without offering payment (*d*).

**1173.** If the bill be against the grantee of an annuity in possession of the estate, for an account of rents and profits, the plaintiff must offer to redeem on the terms of the annuity deed; or, if time have altered the circumstances, then upon (*e*) such equitable terms as the court shall direct. But it was held by Lord Lyndhurst, C. B., in a suit to recover possession of an estate mortgaged to secure a gambling debt, that no offer of repayment of a part of the debt, which had been *bonâ fide* advanced, was necessary, because, as in the case of the prayer for an account, the filing of the bill amounted to a submission to such decree as the court should think fit to make (*f*).

**1174.** The offer to redeem, or other equity offered by the plaintiff, should correspond with the judgment to which the party is entitled (*g*). If the offer be made by the mortgagor, in a suit by the mortgagee, not seeking foreclosure but to have his security perfected (**484**), the offer must extend to payment of all that the mortgagee claims to cover by his security, in case he establishes his right; otherwise there can be no foreclosure in case of default in payment, in pursuance of the offer; and in a suit in which that judgment cannot be given, the amount of the mortgagee's debt may not be brought into question (*h*).

(*d*) *Jefferys v. Dickson*, L. R., 1 Ch. 183.

(*e*) *Knebell v. White*, 2 Y. & C. 15; *Burrowes v. Molloy*, 2 Jo. & Lat. 521. And see *Cave v. Foulks*, 5 L. J., N. S., Ch. 206. An opinion has, however, been expressed by Turner, L. J., whose attention was not called to these authorities, that the only right of the prior incumbrancer, being an annuitant, is to have the arrears of the annuity paid, and that whether his annuity be or be not repurchaseable; in the former case,

the repurchase being at the option of the grantor, it would be a variation of the contract to compel repayment as the price of relief. (*Knight v. Bowyer*, 2 De G. & J. 421; 4 Jur. (N. S.) 569.)

(*f*) *Parker v. Alcock*, Younge, 361; see *Fagg v. James*, 6 L. T., N. S. 675; *Barry v. Bernal*, 16 W. R. 918.

(*g*) *McDonough v. Shewbridge*, 2 Ba. & Be. 555.

(*h*) *Grugeon v. Gerrard*, 4 Y. & C. 119.

**1175.** The offer must be express, and is not sufficiently indicated by the words, "upon payment by the plaintiff of what shall be found due," if not paid out of another estate of which the accounts have not been taken; or simply "upon payment of what shall be found due;" which is consistent with a payment at any time convenient to the mortgagor (*i*); and it has been said that an allegation, that certain defendants claim an interest in the premises, can be considered as an offer only to redeem those who, upon investigation, appear to have a right to be redeemed (*k*).

And, as a general rule, an offer gratuitously made by the pleadings cannot be recalled (*l*). And a person who offered to redeem, under the belief that the debt, to which the offer applied, was all that was secured on the estate, was held to his offer, though it proved that the property was subject to more debts than it was worth, and though he submitted to be foreclosed (*m*). But the court may in its discretion refuse to enforce the offer where it would be unjust to do so (*n*), or where it is so limited in its terms as not to be strictly applicable to the state of affairs which has resulted from the hearing of the cause. Therefore, where a mortgagee disputed a lien, which was claimed upon the title deeds, in priority to his mortgage, but offered to discharge it in case the lien should be established by the court; the decision being against the lien, the plaintiff was held to be discharged of his offer (*o*).

**1176.** In accordance with the rule of the Court of Chancery against the mixing of distinct matters in one suit, and because the mortgagee has an immediate right to have his accounts taken, and a time fixed for payment, and is not bound to wait the result of taking accounts, and other matters in which he has no interest (*p*), a mortgagor formerly could not

(*i*) *Harding v. Pingey or Tingey*, 10 Jur. (N. S.) 872; 34 L. J. (Ch.) 13; *Hughes v. Cook*, 34 Beav. 407.

(*k*) Per Turner, L. J., *Earl Mansfield v. Ogle*, 7 De G., M. & G. 189.

(*l*) 2 Sw. 134; *Bazzalgetti v. Battine*, id. 156, note.

(*m*) *Holford v. Burnell*, 1 Vern. 448; 1 Eq. Ca. Abr. 35.

(*n*) *Knight v. Bowyer*, 2 De G. & J. 421; 4 Jur. (N. S.) 569.

(*o*) *Pelly v. Wathen*, 7 Hare, 352; S. C. on app., 1 De G., M. & G. 16.

(*p*) *Pearse v. Hewitt*, 7 Sim. 471.

by the same bill seek redemption of one, and foreclosure of another mortgage (*g*); and a mortgagee might demur to a bill, which, besides redemption, sought a general administration (*r*) of the personal estate of the deceased mortgagor, and a declaration of the rights of devisees and legatees. The practice in these matters will now be governed by the statutory right to unite in the same action and in the same statement of claim several causes of action, subject to the power of the court or judge to make orders for separate trials or separate disposal of the claims (*s*). Under the old practice, however, it seems that there was no objection to a bill, by which an assignee of a mortgage of several estates, of the equity of redemption of one of which he is a purchaser, sought at once specific performance and conveyance from the representatives of the mortgagor, and redemption or foreclosure against *puisné* mortgagees; for all this relief only tends to the completion of the plaintiff's title (*t*). Again, a mortgagee of several estates, each subject to a distinct prior mortgage, might in one suit pray an account against the several prior mortgagees, and foreclosure against the mortgagor, and also call in question the propriety of a sale made by one of the prior mortgagees (*u*). So if one person were mortgagee of an estate, and of portions charged thereon, he might in the same suit foreclose the mortgagors of the portions and of the estate (*v*). And where the estate of a wife was entitled in equity to be recouped certain payments out of her husband's estate, upon which equity her executors having refused to sue, a judgment creditor of the wife filed a bill against them, a person claiming the husband's estate, and a mortgagee of the wife entitled in priority to the judgment creditor; it was held that the mortgagee was properly joined, in order that his debt might first be ascertained and paid, although the claimant under the husband was not concerned with the mortgagee's rights (*x*).

(*g*) *Plumbe v. Plumbe*, 4 Y. & C. 345.

(*r*) *Pearse v. Hewitt*, *supra*.

(*s*) Supreme Court of Judicature Act, 1875, c. 77, Ord. xvii. (1), (2).

(*t*) See *Sober v. Kemp*, 6 Harc, 155.

(*u*) *Inman v. Wearing*, 3 De G. & S. 729.

(*v*) *Pearce v. Watkins*, 5 De G. & S. 315.

(*x*) *Lancaster v. Evors*, 4 Beav. 158.

*Of the Defences to the Claim to redeem.*

**1177.** The condition (*y*) or the equity of redemption may be released; and, in the case of copyholds, after the admittance of the mortgagee; for the rule, which prohibits a trustee from buying the trust estate from his cestui que trust, does not apply to a purchase by the mortgagee of the equity of redemption from the mortgagor; although, during the subsistence of that equity, he may not take from the mortgagor an interest, such as a long lease at an ordinary fixed rent, by the grant of which the value of the estate will be materially lessened, and the mortgagor will be hindered from redeeming, and at the same time be left exposed to a suit or action for foreclosure or for the recovery of the debt (*z*). But the right of redemption will not be defeated, if the release (which must be made in writing when the equity is an interest in the land (*a*)) were obtained by fraud or oppression, such as would invalidate a sale between an ordinary vendor and purchaser; or, if by means of the influence given by his position, the mortgagee have obtained the purchase at a nominal or insufficient price; though undervalue alone will not be sufficient to impeach the sale (*b*) (349).

**1178.** The validity of the release may be impeached for other causes; as if it were made by an unauthorized person, as a trustee upon trust for sale (*c*); if there were no release of the covenant for payment of the debt; or if it be shown that the object was only to get possession of the estate, and that accounts were kept or other acknowledgments made of a mortgage title, after the release (*d*). So if the release were made upon a

(*y*) *Hull v. Sharbrook*, Cro. J. 36; 1 Scriv. Cop. 195, ed. 4.

(*z*) Per Lord Redesdale in *Hickes v. Cooke*, 4 Dow. 16, and *Webb v. Rorke*, 2 Sch. & Lef. 661; *Knight v. Marjoribanks*, 2 Mac. & G. 10; Sugd. V. & P. 888, ed. 11. In *Ford v. Olden*, L. R., 3 Eq. 461, Stuart, V.-C., is said to have denied the distinction between the sale and incumbrance of the equity of redemption, which how-

ever appears to be established by good authority.

(*a*) *Massey v. Johnson*, 1 Exch. 241.

(*b*) *Knight v. Marjoribanks*, supra; Sugd. V. & P. 888, ed. 11; *Ford v. Olden*, L. R., 3 Eq. 461; *Purdie v. Millett*, Tam. 28.

(*c*) *Stabback v. Leatt*, G. Coop. 46.

(*d*) *Vernon v. Bethell*, 2 Ed. 110; *Morley v. Elways*, 1 Ch. Ca. 107.

secret trust (*e*), or if there were an agreement giving a new equity to the mortgagor on repayment of the consideration; but not if the agreement were in the nature of a conditional sale of the equity, to be void upon payment at a certain day (*f*), for such an agreement must be strictly performed (*14*).

**1179.** Possession under a judgment of foreclosure inrolled is also a good defence to an action to redeem, where the rights of the plaintiffs, or of those under whom they claim, are concluded by the judgment; but not otherwise, although the mortgagee on foreclosure had no notice of other incumbrances. The defence, therefore, will not hold against an action by subsequent incumbrancers, who were not parties to the suit by which the foreclosure was effected (*g*). Under particular circumstances, however, the foreclosure will be opened, even after inrolment, and a new right will be given to redeem (*1688*).

The foreclosure cannot be pleaded until the final order has been obtained (*h*); for up to that time the estate retains the quality of a mortgage, and would not formerly pass as land, by the will of the mortgagee, made before the date of the order absolute (*i*).

**1180.** A party to an action in which a judgment of foreclosure has been made is bound by it, though it were made in the absence of a person whose interest was not disclosed by the pleadings (*k*). And a mortgagor, defendant in that character to a foreclosure suit, is bound by the decree in that suit in respect of his interest in another character, though the other interest did not appear upon the proceedings (*l*).

But it seems that if a person whose interest has been foreclosed in a suit to which he was a party, become afterwards entitled to another interest in the same estate, derived from

(*e*) *Morley v. Elways*, *supra*.

(*f*) *Ensworth v. Griffiths*, 5 Bro. P. C. 184.

(*g*) *Nichols v. Short*, 2 Eq. Ca. Abr. 608; 15 Vin. Abr. 478.

(*h*) *Senhouse v. Earl*, 2 Ves. 450;

see *Quarrell v. Beckford*, 1 Mad. 269.

(*i*) *Thompson v. Grant*, 4 Mad. 438.

(*k*) *Bromitt v. Moor*, 9 Hare, 374.

(*l*) *Goldsmid v. Stonehewer*, 9 Hare,

a person who was not a party to that suit, the owner of the newly-acquired interest may bring his suit for redemption, notwithstanding the former decree and foreclosure (*m*). But the bill ought to state the former proceedings in the foreclosure suit (*n*).

Redemption, without notice of a settlement of the mortgage, binds the issue under the settlement (*o*).

A mortgagor has been held to be bound by a decree concerning a security upon his estate, although it was made on an appeal with which he had not been served, and to which he was not a party, his interest, however, being identical with that of the appellant. A bill for redemption brought in the English Chancery, on the footing that a certain security should be declared void, was therefore dismissed with costs (*p*), the same security having been declared valid by the Privy Council on appeal, in a Colonial suit by a *puisné* incumbrancer against the mortgagor and the first mortgagee. And it was held, that even if the mortgagor ought in strictness to have been served with the petition of appeal, and might for non-service avoid the decree, he must avoid it by a proceeding in the original suit, and not by a suit in Chancery without regard to the former decree.

**1181.** If the mortgagor and mortgagee be both resident, and process served within the jurisdiction of the Supreme Court, that Court will entertain a suit concerning a mortgage of land out of the jurisdiction; because *æquitas agit in personam*; and the Court of Chancery refused to admit a plea (*q*) to a suit concerning the Island of Sark, that it was part of the Duchy of Normandy, having laws of its own, and under the jurisdiction of the courts of Guernsey; and it was held to be

(*m*) *Bromitt v. Moor*, 9 Hare, 374.

(*n*) *Id.*

(*o*) *Chapman v. Duncombe*, 2 Vern. 142.

(*p*) *Farquharson v. Seton*, 5 Russ. 45.

(*q*) *Toller v. Carteret*, 2 Vern. 494; *Earl of Derby v. Duke of Athol*, 1 Ves.

202; *Anon.*, 1 Salk. 404; *Paget v. Eade*, L. R., 18 Eq. 118. But there must be an equity arising out of some privity between the parties. (*Norris v. Chambres*, 29 Beav. 246; 7 Jur. (N. S.) 59, 689; 3 De G., F. & J. 583).

a further reason against the plea, if the mortgage affected the whole country, as its own courts can have no jurisdiction (*r*).

**1182.** The Court of Chancery always refused to determine the redemption of mortgages in, or other disputes concerning, the inns of court or of law, unless liberty had first been given by the benchers of the society in which the dispute has arisen; for which the reason is given, that the disputes of the societies may be terminated among themselves (*s*). The course appears to be, in all disputes concerning mortgages, to apply in the first instance to the benchers, to be admitted to redeem or foreclose; and in one report of the case referred to, it appears that an order of pension was made by the benchers of Gray's Inn, reciting that the question in dispute was matter of account, which the bench was not capable of taking, and the mortgage of long standing, but that the plaintiffs were at liberty to seek their remedy in equity as they should be advised. But by another report, it appears that, after determining the right, the court ordered that the benchers should settle what was due for principal, interest and costs, and take account of the several receipts and allowances.

**1183.** If a paramount title be pleaded to a suit for redemption, it must be shown not only that the title is paramount, but also that it is good against the mortgage. A defence, therefore, to a suit to redeem a mortgage for a term, that the defendant is devisee of a prior term, without condition of redemption, is insufficient (*t*); for the devised term may be only a term to attend the inheritance.

And as the mortgagor is never allowed to impeach the mortgage which he has made (*u*), so the mortgagee may not allege that the title of the mortgagor under whom he claims is defective, or that a valid conveyance is not pleaded (*v*). But where the suit is instituted for a purpose other than that

(*r*) 2 Vern. 495; 1 Ves. 204; and see *Arglasse v. Muschamp*, 1 Vern. 75.

(*s*) *Rakestraw v. Brewer*, 2 P. W. 511; Sel. Ca. in Ch. 55.

(*t*) *Meder v. Birt*, Gilb. Rep. in Eq.

185; 2 Eq. Ca. Abr. 682.

(*u*) *Darcy v. Callan*, 2 Jo. 60.

(*v*) *Wroe v. Clayton*, 9 L. J., Ch. (N. S.) 107; 8 id. 356; *Roberts v. Clayton*, 3 Anst. 715.

of enforcing the ordinary rights of ownership,—such as the performance of the trusts of a charity,—it must be shown that the property has been legally appropriated to such purpose (*x*).

**1184.** It has been provided by statute (*y*), that if any person shall borrow any money, or for other valuable consideration give or suffer any judgment, statute or recognizance; and shall afterwards borrow any other sum from any other person, or become indebted for other valuable consideration, and for securing repayment or discharge thereof, shall mortgage his, her or their lands or tenements, or any part thereof, to, or to any trustee for, the said second or other lender or creditor, and shall not give notice to the mortgagee or mortgagees of the said judgment, statute or recognizance, in writing under his, her or their hand or hands, before the execution of the mortgage or mortgages; unless the mortgagor or mortgagors, his, her or their heirs, upon notice in writing under the hands and seals of the mortgagee or mortgagees, his, her or their heirs, executors, administrators or assigns, attested by two or more sufficient witnesses, of any such former judgment, statute or recognizance, shall within six months pay and discharge the same, and all interest and charges due thereon, and cause the same to be vacated or discharged by record; then all equity of redemption of the said lands and tenements, as against the mortgagee, his representatives or assigns, is taken away from the mortgagor, his representatives and assigns, and the former may hold the mortgaged property as against the latter for such estate and term therein as was granted and settled to the mortgagee, as fully as if the same had been purchased absolutely and without power of redemption. And that if any person shall mortgage any lands or tenements for the security of money lent or due, or for other valuable consideration, and shall again mortgage the same or any part thereof to any other person or persons for valuable consideration (the former mortgage being in force and not discharged), and shall not discover to the second or other mortgagee or mortgagees, or some or

(*x*) *A.-G. v. Gardner*, 2 De G. & S.      (*y*) 4 & 5 W. & M. c. 16, s. 2.  
102.



one of them, the former mortgage or mortgages, in writing under his or their hands; then the mortgagor or mortgagors, his, her or their heirs, executors, administrators or assigns, shall have no relief or equity of redemption against the said second or after mortgagee or mortgagees, his, her or their heirs, executors, administrators or assigns, upon the said after mortgage or mortgages; but such mortgagee or mortgagees, his, her or their heirs, executors, administrators and assigns, shall and may hold and enjoy such more than once mortgaged lands and tenements, for such estate and term therein as was or were granted and conveyed by the said mortgagor or mortgagors against him, her or them, or his, her or their heirs, executors or administrators respectively, freed from equity of redemption, and as fully as if the same had been an absolute purchase (*z*). But the act reserves the right of redemption of subsequent mortgagees (*a*).

**1185.** The act does not affect the legal right of redemption; and does not enable the mortgagee by an active remedy to enforce a forfeiture. Being penal, it will be strictly applied to such instruments only as fall within the technical description of a mortgage, and is therefore not applicable to a mere charge without any time fixed for redemption (though containing a covenant to execute a legal mortgage), either as the first mortgage which has been concealed, or as the second made without notice of the first (*b*).

Being limited to several mortgages of the same lands, it will not apply where new lands are added to the subsequent security, though the addition of an acre or two or the like would not exempt the case from the statute, but would be looked upon as a contrivance to evade it (*c*). It appears that, by the same rule, the statute would not apply where the subsequent mortgage is made by an assignee of an equity of redemption, though he had notice of the prior mortgage; for the original mortgagor only is mentioned.

But having been intended for the benefit of honest mort-

(*z*) 4 & 5 W. & M. c. 16, s. 3.

(*a*) Sect. 4.

(*b*) *Kennard v. Futvoye*, 2 Gif. 81.

(*c*) *Stafford v. Selby*, 2 Vern. 589.

gagees, it cannot be pleaded by a person who has been guilty of fraud or ill practice. Hence, where a person distressed a mortgagor by suing him for foreclosure in the name, but without the privity, of the mortgagee, and having procured the money by a new mortgage to another, without giving him notice of a prior incumbrance, got in that mortgage, and also purchased the equity of redemption, he was not allowed to plead this statute against a person coming to redeem under the prior incumbrance (*d*).

A mortgage which has become irredeemable under the statute remains irredeemable in the hands of an assignee, and the statute may be pleaded by him though the assignment were made in consideration of what was due for principal, interest and costs. And if such a mortgage be redeemed by a subsequent mortgagee, he shall hold the estate irredeemable (*d*).

(*d*) *Stafford v. Selby*, 2 Vern. 589. In connection with this subject, it may here be noted, that by statute any seller or mortgagor of land or chattels, real or personal, or choses in action, conveyed or assigned to a purchaser or mortgagee, or the solicitor or agent of any such seller or mortgagor, who shall conceal any settlement, deed, will or other instrument material to the title or any incumbrance from the purchaser or mortgagee, or falsify any pedigree upon which the title does or may depend in order to induce him to accept the title with intent to defraud, shall be guilty of a misdemeanor, and shall be liable to fine or imprisonment for any time not exceeding two years with or without hard labour, or both; and shall also be liable in an action for damages at the suit of, or of those claiming under the purchaser or mortgagee, for any loss sustained in consequence of the concealment, or by any claim made by any person whose right was concealed by the falsification of such pedigree; and in estimating the damages, where the estate shall be recovered from such purchaser or mort-

gagee, regard shall be had to any expenditure by them or any or either of them in improvements upon the land. But no prosecution for any such offence shall be commenced without the consent of her Majesty's Attorney-General, or (when that office is vacant) Solicitor-General, which is not to be given without previous notice of the application for leave to prosecute to the person intended to be prosecuted, as the Attorney or Solicitor-General shall direct. The term "mortgage" includes every instrument by virtue whereof land is conveyed, assigned, pledged or charged as security for the repayment of money or money's worth lent, and to be reconveyed, reassigned or released on satisfaction of the debt. "Mortgagor" includes every person by whom any such conveyance, assignment, pledge or charge shall be made; and "mortgagee" every person to whom, or in whose favour any such conveyance, assignment, pledge or charge is made or transferred. "Judgment" includes registered decrees, orders of courts of equity and bankruptcy, and other orders having the operation of judg-

*Of the Time for Redemption.*

**1186.** A mortgage in which a time is fixed for redemption does not, by the rules of equity, become redeemable until that time has arrived, and an earlier redemption will not be compelled against the mortgagee (who may demur), even where the mortgagor tender interest during the whole intervening period (*f*).

**1187.** The right of redemption, either under a mortgage or a pledge (*g*), cannot be altogether done away by the original contract, though it may be postponed by a covenant that during a certain time the estate shall remain irredeemable (536). Arrangements of this nature, postponing the remedies both of the mortgagor and the mortgagee, are of common occurrence, and are usually limited to periods of five or seven years, and they are supported on the ground that the contract is valuable to both parties; the mortgagee, on the one hand, being sure of a continuing security for his money, and the mortgagor being freed from the expense and trouble of seeking new lenders (*h*). A mortgagee is entitled to the benefit of such a covenant against a subsequent mortgagee, who took his security with notice of the covenant, and who will not be allowed during the stipulated period to redeem the prior mortgage (*i*). If he take without notice, the equity of redemption also still seems to be bound in his hands by the covenant of the mortgagor, who can give to another no better equity against the first mortgagee than he had himself. But where there was a proviso for redemption at a period more than

ments. (22 & 23 Vict. c. 35, ss. 24, 25; and 23 & 24 Vict. c. 38, s. 8.)

(*f*) *Brown v. Cole*, 14 Sim. 427; 14 L. J., N. S., Ch. 167; and see *Burrowes v. Molloy*, 2 Jo. & Lat. 521. See the statutory exception under 8 & 9 Vict. c. 18, s. 114 (Lands Clauses Act). Note the difference where, instead of a proviso for redemption, there is only a trust for sale upon non-payment at a certain day, but the estate is redeemable before or after it. (Hard

*ing v. Tingey*, 10 Jur. (N. S.) 872; 34 L. J. (Ch.) 13.)

(*g*) *Story*, Bailm. §§ 318, 345.

(*h*) A condition for punctual payment of interest is implied if not expressed in an agreement that the mortgage debt shall not be called in during a certain term. (*Seaton v. Twyford*, L. R., 11 Eq. 591).

(*i*) *Lawless v. Mansfield*, 1 Dru. & War. 602.

thirty years distant from the date of the mortgage, and the estate, of which immediate possession had been taken by the mortgagee, had greatly increased in value, redemption was decreed (*k*) before the time fixed, as upon an unreasonable bargain; and where the mortgagee was the solicitor of the mortgagor, a restraint upon redemption for twenty years, with twelve months' notice after that time, was rejected as oppressive (*l*).

**1188.** And equity does not, except under peculiar circumstances, recognize agreements to confine the right of redemption to any given period, as the life of the mortgagor (*m*); or to any specified class of persons, as to the mortgagor alone, or the heirs of his body (*n*). In the one case, the right will be opened to the extent allowed by the Statute of Limitations, and, in the other, it will be given to the persons in whom it might ordinarily become vested. In the case first cited it is laid down as a general rule by Lord Nottingham, "once a mortgage and always a mortgage;" and that the security could not be extinguished by any covenant or agreement at the time of making the contract (*o*). But a bill having been brought to reverse the former decree, Lord Keeper North said, "*modus et conventio vincunt legem*;" all conditional purchases must not be turned into mortgages, and where there is a condition or covenant that is good and binding at law, equity will not take it away" (*p*). The rule, as explained by Lord Hardwicke, is (*q*), that an attempt to fetter the equity of redemption will not avail either by original agreement in the mortgage deed, or by a separate deed, where there is a design to wrest the estate fraudulently out of the hands of the mortgagor. And where the redemption was limited to the lifetime of the mortgagor, and it was shown that this was done by him by way of

(*k*) Talbot v. Braddyl, 1 Vern. 183, 394.

(*l*) Cowdry v. Day, 1 Gif. 316; 5 Jur. (N. S.) 1199.

(*m*) Newcomb v. Bonham, 1 Vern. 8; Freem. Ch. 67; Spurgeon v. Collier, 1 Eden, 55. Contra as to the right to

foreclose, see Burrowes v. Molloy, 2 Jo. & Lat. 521.

(*n*) Howard v. Harris, 1 Vern. 32.

(*o*) Newcomb v. Bonham, 1 Vern. 8, and n. (1).

(*p*) Id., 1 Vern. 215; 2 Vent. 364; Howard v. Harris, 1 Vern. 193.

(*q*) Mellor v. Lees, 2 Atk. 495.

settlement with a wish to benefit the mortgagee, his near relation, and that the clause for redemption was put in for a particular reason; and there being also an express covenant that the mortgagor might redeem *at any time* during his life, which might have made it a bad bargain for the mortgagee, the deed was established (*r*).

**1189.** Nor will an agreement be allowed at the time of the loan, not to sue for redemption or for the discharge of the equity of redemption upon any event or condition (*s*); nor a separate covenant that if the mortgagee shall think fit, the mortgagor will convey to him so much of the estate as shall be of the value of the mortgage money at so many years' purchase (*t*); nor even an agreement (*u*), which compelled the mortgagee to pay the residue of the purchase-money at a certain time; as where the mortgagee entered into a bond to pay the mortgagor a further sum, within a certain time after default in payment of principal and interest, in full for the absolute purchase of the estate: these being justly regarded as so many devices to evade the rules of the court.

**1190.** The court will not object to a covenant in a mortgage for a right of pre-emption in the mortgagee in case the estate be sold; though he is liable to be deprived of its benefit by oppressive or fraudulent conduct; as where the mortgagee previously insisted on payment of principal and interest, and, concealing the covenant from the heir of the mortgagor, did not claim the right till after the sale of the estate to another person (*v*).

**1191.** It was said, that wherever there was a mortgage or a pledge of goods, the party might take his remedy in equity (*x*). It was not, however, a general rule that a person

(*r*) *Bonham v. Newcomb*, 1 Vern. 232; 2 Vent. 364; aff. in Parl. 2 W. & M.

(*s*) *E. I. Company v. Atkins*, 1 Com. 349; *Toomes v. Conset*, 3 Atk. 261; *Vernon v. Bethell*, 2 Ed. 110.

(*t*) *Jennings v. Ward*, 2 Vern. 520.

(*u*) *Willett v. Winnell*, 1 Vern. 487.

(*v*) *Orby v. Trigg*, 2 Eq. Ca. Abr. 599; 9 Mod. 2.

(*x*) *Ryal v. Roberts*, Barn. Ch. 38.

might come into equity for the redemption of personal chattels, for upon tender of the money an action at law might be brought for the chattels; but there might be a right to sue in equity, in order to take an account of what is due on the security. As where the plaintiff is the assignee of the pledgor, and therefore a stranger to the amount due (*y*). So where A. pledged chattels personal with B., with an agreement for redemption in twelve months, but otherwise that the goods should be as bought and sold, and B. pledged the same chattels and other goods to C., to secure a larger sum, and borrowed other monies of C. on notes, and became bankrupt; a decree for redemption was made on A.'s bill against C. (*z*). And stock may be redeemed; but the privilege of redemption will be sparingly allowed if the bill appear to have been brought on account of an accidental increase in the value of the pledge (*a*).

And, on the other hand, if the proviso be that the stock shall be replaced according to a covenant on a certain day, which the mortgagee suffers to elapse, the terms of the security in other respects remain as before; and though the value of the stock have fallen, the mortgagor will not be obliged to pay as the price of later redemption the market value of the stock at the original day, even though such damages might be recovered at law as damages for breach of the covenant (*b*).

**1192.** Where no time has been fixed for the redemption of goods which are subject to an ordinary pledge, it is said that the pledgor may redeem at any time during his life, except during his outlawry (*c*), the death of the pledgee not affecting the right; but none being allowed after the death of the pledgor, because as to him it is a personal condition (*d*).

(*y*) *Ratcliff v. Davis*, 1 Bulst. 29; *Kemp v. Westbrook*, 1 Ves. 278.

(*z*) *Demainbray v. Metcalfe*, 2 Vern. 690, 698.

(*a*) *Lockwood v. Ewer*, 2 Atk. 303.

(*b*) *Blyth v. Carpenter*, L. R., 2 Eq. 501; see *M'Arthur v. Seaforth*, 2 Taunt. 257; and as to bonds for restoration of

specific sums of stock, see *Forrest v. Elwes*, 4 Ves. 492; *Goddard v. Lethbridge*, 16 Beav. 529.

(*c*) *Ratcliff v. Davis*, 1 Bulst. 29; *Yelv.* 178, per Williams, J.

(*d*) *Id.*; *Kemp v. Westbrook*, 1 Ves. 278.

A person who has redeemed pledged goods on behalf of the owner, but has parted with the possession of them and refuses to say where they are, is liable in trover without a formal tender of the money paid for redemption (*e*).

**1193.** A pledge to a professional pawnbroker is redeemable within twelve months from the day of pawning, exclusive of that day, with seven additional days of grace. If the pledge be for ten shillings or under and be not redeemed within that time, it will at the end of the days of grace become the absolute property of the pawnbroker: but if for above ten shillings it will be further redeemable until disposed of under the act (**824**), notwithstanding the expiration of the year and days of grace (*f*).

**1194.** When a mortgagee shall have obtained possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage but within *twenty* years next after the time at which the mortgagee obtained such possession (*g*) or receipt, unless, in the meantime, an acknowledgment in writing of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him; and in such case no such suit shall be brought but within *twenty* years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than

(*e*) *Jones v. Cliff*, 1 Cr. & M. 540;  
3 Tyr. 576.

(*f*) Pawnbrokers Act, 1872, ss. 16,  
17, 18.

(*g*) As to the mode of averment of  
possession, see *Lucas v. Dennison*, 13  
Sim. 584.

one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the person or persons signing as aforesaid, and those claiming any part of the mortgage money or land or rent, by, from or under him or them, and persons entitled to any estate or interest to take effect after or in defeasance of his or their estate or interest; and shall not operate to give the mortgagor or mortgagors a right to redeem, as against the persons entitled to any other undivided or divided part of the money, land or rent. And where such of the mortgagees or persons aforesaid, as shall have given such acknowledgment, shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent, on payment with interest of the part of the mortgage money, which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage (*h*).

From and after the 1st January, 1879, *twelve* years must be substituted for *twenty* years in reading this enactment (*i*).

The proviso as to the effect of an acknowledgment by one of several mortgagees, applies only to mortgagees who have several interests in the money or land. Where they are joint tenants an acknowledgment by all is necessary to take the case out of the statute; and if made by less than all it is entirely inoperative (*j*).

**1195.** So long as the mortgagor holds possession of any part of the estate, no lapse of time will bar his right; for as to the part of which he keeps possession his right remains. And, as he cannot (*k*) redeem that separately, he is allowed to redeem

(*h*) 3 & 4 Will. 4, c. 27, s. 28.

(*i*) Real Property Limitation Act, 1874, s. 7. The statutes being alike except as pointed out in the text, the principle of the decisions on the con-

struction of the Act of Will. 4 will apply to the Act of Victoria.

(*j*) *Richardson v. Younge*, L. R., 10 Eq. 275; 6 Ch. 478.

(*k*) *Rakestraw v. Brewer*, Sel. Ca. in



all. Yet an estate may become irredeemable as to part and redeemable as to the residue ; as in a case mentioned by Lord Rosslyn (*l*), where the property went into different hands, and the owners of one part did acts amounting to acknowledgments of a mortgage title, but the other part became irredeemable.

**1196.** Time will not run in the case of a common mortgage until the day of redemption has arrived ; for the mortgagor cannot redeem before that day (*m*). But, it will be remembered, that Courts of Equity put a check upon transactions in which an unreasonable time or an improper condition has been fixed for redemption, and that in such cases they will decree redemption (*n*) before the arrival of the day fixed by the parties.

As to Welsh mortgages it is presumed, that time will not run under the statute against the mortgagor, until the mortgage has been fully satisfied ; possession by the mortgagee being of the essence of the contract, and every receipt of rent being a receipt of interest under the mortgage. And it has always been held that such mortgages are redeemable after any length of time, until the mortgagee has been fully paid and has held over for twenty years (*o*) (**11, 1466**). But a plaintiff who seeks to redeem a mortgage alleged to be of this nature after many years, must prove his case clearly and indefeasibly (*p*).

**1197.** The statute of Will. 4 proceeds upon a principle which had been already recognized by the Court of Chancery as applicable to the limitation of the right of redemption, viz. that the antiquity of the defendant's possession is more to be regarded than the novel accruer of the plaintiff's title (*q*). So

Ch. 56; *Burke v. Lynch*, 2 Ba. & Be. 426. There seems no reason to doubt that the rule will apply under the statute.

(*l*) 3 Ves. jun. 22; and see *Blake v. Foster*, 2 Ba. & Be. 387.

(*m*) *Brown v. Cole*, 14 Sim. 427.

(*n*) *Talbot v. Braddyl*, 1 Vern. 183, 394; and see *Ord v. Smith*, Sel. Ca. in Ch. 10.

(*o*) *Yates v. Hambly*, 2 Atk. 360; *Longuet v. Scawen*, 1 Ves. 403; *Fenwick v. Reed*, 1 Mer. 114; *Balfe v. Lord*, 2 D. & W. 480. And see *Alderson v. White*, 2 De G. & J. 97.

(*p*) *Sevvaji Vijaya, &c. v. Chinna Nayana Chetti*, 10 Mo. E. I. 151.

(*q*) *Ashton v. Milne*, 6 Sim. 369; see *Cholmondeley v. Clinton*, 4 Bligh, 1.

that the court made no exception to the rule against giving relief, after twenty years' possession by the mortgagee, during the ownership of the person entitled to the prior estate, and having a right to redeem, in favour of persons whose title did not accrue until after the lapse of the twenty years. If the person, for the time being entitled to redeem, neglected his right, the neglect gave no new equity to his successor. Hence no benefit of the statute was given to the remainderman within twenty years from the death of the tenant for life, where the mortgagee entered during the tenant for life's estate and kept possession without acknowledgment during the full period (*r*). And so where, during the possession, there was a tenancy by the curtesy (*s*).

But the old rule still holds good (*t*), that the mortgagee's possession during the whole period must be adverse. Therefore if the mortgagee become entitled to an interest in the equity of redemption during his possession, as the interest of a tenant for life, the curtesy of a husband seised in right of his wife, or otherwise, he will lose the benefit of the statute, whether he acquire the interest during (*u*) or before taking (*v*) possession. And time will not run in his favour so long as the estate remains irredeemable; e. g., in the instances above mentioned against the remainderman or the heir of the wife, until the death of the tenant for life or of the husband.

So where the equity of redemption being vested in the husband and wife jointly, they conveyed by deed without fine to the mortgagee (whereby the deed being inoperative as to her estate, the mortgagee's ownership was absolute only in case the husband survived), and the wife eventually acquired the fee by survivorship, her heir was held entitled to redeem within twenty years from the husband's death (*w*). And the

(*r*) *Harrison v. Hollins*, 1 Sim. & St. 471; *Dallas v. Floyd*, cited 6 Sim. 379; *Cholmondeley v. Clinton*, supra.

(*s*) *Anon.*, 2 Atk. 333.

(*t*) *Corbett v. Barker*, 3 Anst. 755; *Reeve v. Hicks*, 2 Sim. & St. 403; *Raffety v. King*, 1 Keen, 601 (disapproving of *Ashton v. Milne*, 6 Sim.

369); *Hyde v. Dallaway*, 2 Hare, 528.

(*u*) *Hyde v. Dallaway*, supra.

(*v*) *Raffety v. King*, 1 Keen, 601.

(*w*) *Price v. Copner*, 1 Sim. & St. 347; 1 L. J. 178. But it seems she should have had but ten years, for the right to redeem was first in her husband.

conveyance of the equity in such a case will have no greater force than it has by law; so that, although it may purport to be a conveyance of the fee by the husband and wife, this will not make the time run against her from the date of the deed (*x*).

So a sale under a decree obtained in 1733, by collusion between the tenant for life and others to the prejudice of the remainderman, was set aside at the suit of the latter, brought sixty-three years afterwards, and within three months after his title accrued (*y*): and in another case (*z*), a decree for redemption was made at the suit of the remainderman thirty-five years after the collusive sale, the tenancy for life having lasted during the whole of that time. But it will be fatal to the remainderman's right to relief in such cases, if he have stood by and encouraged the defendants to believe themselves secure. And it should also be observed, that to give the remainderman a right to relief, the purchaser must be a party to, or at least have notice of, the fraud.

**1198.** Possession is not the less adverse because it was taken by consent of the real owner, under a mistake on his part, where the person in possession has no duty to discharge towards the owner (*a*); but a mortgagee who has taken possession under the order of the court will not be considered to hold without title from the mortgagor's death, where that event was only established by inference at a subsequent date (*b*).

The possession of a constructive trustee may be adverse after a considerable lapse of time, even on a transaction arising out of fraud (*c*). The statute of Will. 4 (*d*) provides, that when any land or rent shall be vested in a trustee, upon any express trust, the right of the *cestui que trust*, or person claiming through him, to sue, shall be deemed to have first accrued at and not before the time at which the land or rent shall have

(*x*) *Ravald v. Russell, Younge*, 9.

(*y*) *Gore v. Stacpoole*, 1 Dow, 18.

(*z*) *Bandon v. Becher*, 3 Cl. & Fin.

(*a*) *Cholmondeley v. Clinton*, 4

Bligh, 1.

(*b*) *Hickman v. Upsall*, W. N. 1876;

135.

(*c*) *Beckford v. Wade*, 17 Ves. 87;

*Collard v. Hare*, 2 R. & M. 675.

(*d*) 3 & 4 Will. 4, c. 27, s. 25.

been conveyed to a purchaser for valuable consideration, and then only as against such purchaser, and any person claiming through him. This section does not include a security in which the property is vested in a trustee for sale, the trust being for the benefit of the creditor only, who is substantially in the position of a mortgagee (*e*).

The purchaser of an equitable life estate has not an adverse possession against the trustee of the legal estate until the death of the tenant for life; because the trustee holds both for the tenant for life and the remainderman (*f*).

But by the Real Property Limitation Act, 1874, no action, suit or other proceeding shall be brought after the 1st January, 1879, to recover any money charged upon any land or rent secured by an express trust, or to recover arrears of rent or interest in respect of any money so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust (*g*).

**1199.** Before the passing of the statute of Will. 4, the right of redemption might be saved to the mortgagor, his representative or assignee, by any acknowledgment on the part of the mortgagee that he held by a mortgage title only, and which could be proved by clear and unequivocal parol or other evidence (*h*). Such an acknowledgment might be evidenced, not only by letters or express words or by conversations, but also by the acts of the mortgagee; as the keeping accounts (*i*) of the mortgaged property, if they were kept as mortgage accounts; for accounts kept by the mortgagee's agent as between himself and his principal, as landowner, though in a distinct book, were held not to be sufficient (*k*). So an assignment of the mortgage, though the mortgagor were no party, a devise

(*e*) *Locking v. Parker*, L. R., 3 Ch. 30; and see *Kirkwood v. Thompson*, 2 H. & M. 392.

(*f*) *Fausset v. Carpenter*, 2 Dow & Cl. 232.

(*g*) 37 & 38 Vict. c. 57, s. 10.

(*h*) *Whiting v. White*, Coop. 1;

*Reeks v. Postlethwaite*, Id. 161; *Barron v. Martin*, Id. 189.

(*i*) *Anon.*, 2 Atk. 333; case cited, 3 Ves. 22; *Cutler v. Cremer*, 1 L. J., Ch. 108.

(*k*) *Barron v. Martin*, Coop. 189.

of the mortgage, or a recital in a deed or will (*l*), were good acknowledgments; but not a conveyance of the estate, subject to such equity of redemption, *if any*, as persons named had in the same (*m*): nor was a mortgagee bound by an actual acknowledgment, given by his agent without his authority, as where the mortgagee from his state of mind was unable to authorize such an acknowledgment (*n*).

An agreement to purchase the equity of redemption (*o*), or a bill brought by the mortgagee to foreclose, was naturally an admission of a right to redeem; and in one case (*p*), where the mortgaged property had been demised for a term, determinable with the mortgagee's interest, and several bills of foreclosure had been filed during the plaintiff's infancy, redemption was decreed on a bill filed by him within two years after full age, though fifty-five years had elapsed from the date of the mortgage, and forty-seven years since the mortgagee was in possession.

**1200.** The statute now requires that the acknowledgment be made in writing. But whatever expressions made by parol would have amounted before the statute to an acknowledgment, will still be sufficient if in writing, and if the other requirements of the statute be duly satisfied (*q*). Any expression, therefore, referring to the estate as mortgaged, or to the person entitled to the equity of redemption, and expressing a readiness to settle the account, or referring to a proposed arrangement for accounting or for paying off the mortgage debt, will still be a sufficient acknowledgment. No particular form is necessary; and the amount alleged to be due need not be stated (*r*); and the acknowledgment made as well by affidavit in a suit,

(*l*) Case cited, 3 Ves. jun. 22; *Smart v. Hunt*, 4 Ves. 478, n.; *Perry v. Marston*, 2 Bro. C. C. 399; *Hansard v. Hardy*, 18 Ves. 455; *Anon.*, 3 Atk. 313; *Price v. Copner*, 1 S. & S. 347; 1 L. J. 178. See *Carew v. Johnston*, 2 Sch. & Lef. 295.

(*m*) *Hardy v. Reeves*, 4 Ves. 466.

(*n*) *Barron v. Martin*, Coop. 189.

(*o*) *Conway v. Shrimpton*, 5 Bro.

P. C. 187.

(*p*) *Palmer v. Jackson*, 5 Bro. P. C. 281.

(*q*) *Stansfield v. Hobson*, 16 Beav. 236.

(*r*) *Trulock v. Robey*, 12 Sim. 402; *Stansfield v. Hobson*, 16 Beav. 236, and 3 De G., M. & G. 620; *Hodley v. Healy*, 6 Mad. 181; 1 V. & B. 536; *Lord St. John v. Boughton*, 9 Sim. 219; and see *France v. Simpson*, Kay, 678.

or in a schedule to a deed (*s*), or by an answer to interrogatories (*t*), as by a letter or other writing. But a mere admission by the mortgagee that he holds under a mortgage title, if coupled with a denial of the right claimed, is not sufficient (*u*). No admission will be inferred from equivocal expressions, and it seems that stronger words will be necessary to revive the equity of redemption, after the twenty years have passed, than to support an admission of right which at the time was clearly vested in the mortgagor (*v*).

The question has been raised, but was not decided (*w*), whether the circumstances that the mortgagee during his possession had accounted and treated himself as a mortgagee, would amount to an acknowledgment within the act. But it seems clear that those acts would not be sufficient, unless the accounts or other admissions were written, signed and delivered, according to the directions of the act.

The commencement of an action for foreclosure, however strong an acknowledgment irrespective of the statute, does not appear to fall within its plain words, to which the courts have shown themselves disposed in several cases to adhere. No force is given under this section (28) to an acknowledgment signed by the mortgagee's agent (560), and this was probably intentional, that the acknowledgment might be the more certain. Now it was determined (*x*) under another statute (*y*), which required a writing signed by the party chargeable, that none could be given effectually by an agent; and if it were shown under this act that the action was begun by the written instruction of the mortgagee to his solicitor, it is still done by an agent; and the written instruction to him is not a good acknowledgment (*z*).

### 1201. The admission must be made to the mortgagor him-

(*s*) *Blair v. Nugent*, 3 Jo. & L. 658, 677; Sugd. R. P. S. 130.

(*t*) *Goode v. Job*, 1 E. & E. 6; 5 Jur. (N. S.) 145.

(*u*) *Thompson v. Bowyer*, 9 Jur. (N. S.) 863.

(*v*) *Whiting v. White*, Coop. 1; 2

Cox, 290; *Reeks v. Postlethwaite*, Coop. 161; *Barron v. Martin*, Id. 189.

(*w*) *Baker v. Wetton*, 14 Sim. 426.

(*x*) *Hyde v. Johnson*, 2 Bing. N. C. 776.

(*y*) 9 Geo. 4, c. 14, s. 1.

(*z*) See *Stansfield v. Hobson*, 16 Beav. 236; 3 De G., M. & G. 620.

self (*a*), or to those who claim his estate, or the agent of one of such persons. Therefore a transfer of mortgage to which the mortgagor, or the claimant under him, is not a party, will not be an acknowledgment (*b*), and the transferee cannot be considered as a claimant of the mortgagor's estate, but of the mortgagee's.

No actual authority is necessary to constitute an agent of the person to whom the acknowledgment is made. It is sufficient if it be made to a person acting, or treated by the maker as an agent (*c*). But a letter by the mortgagee to his own solicitor will not take away the benefit of the statute (*d*).

**1202.** The acknowledgment need not have been given within the statutory period from the mortgagee's possession; an acknowledgment after the lapse of that time being sufficient, both before and since the passing of the act of Will. 4, to revive the right of redemption (*e*). If the mortgagee have settled the estate, the acknowledgment of the tenant in tail will revive the right, and a title acquired by him from the owners of the equity of redemption will prevail against the estate created by the settlement (*f*): and the mortgagee's acknowledgment will bind his lessee, though no party to it (*g*).

**1203.** The effect of the statute is not prevented by a mere demand by one party, without process against or acknowledgment by the other (*h*). But the commencement of a suit to enforce the demand, even by the mere filing of a bill under the old practice of the Court of Chancery, was sufficient to save the right against the statute, though no further proceeding was taken, or service effected; for it might happen that process could not be served until long after the filing of

(*a*) Sect. 28.

(*b*) *Batchelor v. Middleton*, 6 Hare, 75; *Lucas v. Dennison*, 13 Sim. 584.

(*c*) *Trulock v. Robey*, 12 Sim. 402.

(*d*) *Stansfield v. Hobson*, 16 Beav. 236; 3 De G., M. & G. 620.

(*e*) *Id.*, 3 De G., M. & G. 620.

(*f*) *Pendleton v. Rooth*, 1 Gif. 35;

1 De G., F. & J. 81; 5 Jur., N. S. 840; 6 *id.* 182.

(*g*) *Ball v. Lord Riversdale*, Beat. 550.

(*h*) *Hodley v. Healy*, 1 Ves. & B. 536.

the bill. The plaintiff by misconduct or delay may, however, disentitle himself to the benefit of this rule (*i*). Since the court has been empowered to make orders for substituted service, the plaintiff's opportunity for delaying the active prosecution of the suit has been much diminished; and it seems that the operation of the statute will not be affected, if it can be inferred that the suit which has been commenced has failed (*h*), or if it have been practically abandoned, although not actually dismissed as to all the defendants (*l*).

1204. It has been observed (*m*), that there is no saving (by sect. 16) for disabilities of the mortgagor, or his heirs, in regard to the bar created by sect. 28; and if the position of the clauses be alone considered, there seems to be good reason for this conclusion; but whether it was intended, and whether Courts of Equity in construing the act would feel bound to deprive the mortgagor and his heirs of this benefit, may be doubted. The only reason why they should be deprived of the advantage, which it is clear they enjoyed when their rights were governed by analogy to the old Statute of Limitations (*n*), seems to be, that by the present statute the right to redeem is limited by a distinct and separate clause; whilst the remedies of mortgagees are affected only in common with the remedies of other persons, who claim "any land or rent in equity" (*o*), and to whose rights the disability clause is generally applicable. But for this there were several reasons. The time of accruer of the right to sue, the nature of the acknowledgment, the persons in whose favour, and against whom, the acknowledgment is to operate, the part of the estate which may be redeemed in certain cases, and the proportion of the mortgage debt and interest necessary to be paid on such redemption, are all matters for which, as they

(*i*) *Coppin v. Gray*, 1 Y. & C. C. C. 205; *Forster v. Thompson*, 4 Dru. & War. 303; *Boyd v. Higginson*, Flan. & K. 608; and see 3 Dru. & War. 123; *Hele v. Lord Bexley*, 20 Beav. 127.

(*h*) *Bampton v. Birchall*, 5 Beav. 67.

(*l*) *Dixon v. Gayfere*, 17 Beav. 421.

(*m*) Sugd. R. P. S. 114.

(*n*) See *Proctor v. Oates*, 2 Atk. 140; *Anon.*, 3 Atk. 313; *Jenner v. Tracy*, 3 P. Wms. 287, n.; *Bonny v. Ridgard*, cit. 17 Ves. 99.

(*o*) Sect. 24.



affect the rights of the mortgagor, it was necessary, or was thought fit, to make special provisions, which were most conveniently combined in a separate clause. But this does not alter the fact that a redemption suit is a suit to recover "land or rent in equity." To such suits the disability clause, as well as those which relate to cases of express trusts (*p*), and of fraud (*q*), are generally applicable; and it would be a singular and narrow construction of the act to bind a mortgagor under disability now, who was not so bound before the present statute, because it was found necessary to give a larger explanation of his other rights. The extension of the 16th to the 28th section appears by no means so strong a conclusion as the extension of the 25th (express trusts) to the 40th and 42nd (569); for, in the former case, both sections refer, in effect, to suits for the recovery of lands, but, in the latter, one contemplates the recovery of land, and the other money and the interest of money charged on land.

**1205.** Persons who omit to set up the Statute of Limitations in the pleadings can have no protection from it (*r*). It may be pleaded as a defence (*s*), or, where it appears on the face of the pleadings that the cause of suit accrued the full number of limited years before the commencement of the suit—as, for instance, in a redemption suit, that the mortgagee had been in possession for twenty years, without treating the estate as a security,—by demurrer (*t*).

**1206.** To make a demurrer tenable, it must appear on the face of the pleadings, by dates positively stated, that the defendant has been in possession for the whole statutory time before

(*p*) Sect. 25.

(*q*) Sect. 26.

(*r*) *Fordham v. Wallis*, 10 Hare, 231; 17 Jur. 228; *Holding v. Barton*, 1 S. & G. xxv.; Jud. Act, 1875, Ord. xix (18).

(*s*) *Aggas v. Pickerell*, 3 Atk. 225; *Batchelor v. Middleton*, 6 Hare, 75; *Adams v. Barry*, 2 Coll. 285.

(*t*) *Jenner v. Tracy*, 3 P. Wms.

287, n.; *Edsell v. Buchanan*, 2 Ves. jun. 83; 4 Bro. C. C. 254; *Hardy v. Reeves*, 4 Ves. 466; *Hodley v. Healy*, 1 Ves. & B. 536; *Beckford v. Close*, cited 3 Bro. C. C. 644; *Foster v. Hodgson*, 19 Ves. 179; *Hoare v. Peck*, 6 Sim. 51; *Prance v. Sympson*, Kay, 678; *Baker v. Wetton*, 14 Sim. 426; and see 3 Y. & C. 275, note.

the action was commenced (*u*). Nothing must be left to be worked out by the inference of the court, or by the arguments of the counsel. Thus a statement in a bill that the defendant took possession *soon after* a certain period, and has held the estate ever since, will not support a demurrer; for the court will not judge what is the meaning of "soon after," and a demurrer, founded on such a statement, will be an argumentative or speaking demurrer, because it must set forth, that possession was taken at or about the time stated, *which is* upwards of twenty years, &c.

Moreover, if there be no certainty as to the commencement of the possession, it will not be presumed (*x*), in favour of a demurrer, that the commencement was within such a time from the date, as to make a possession of twenty years by the mortgagee. And a suit for redemption is not demurrable only by reason of a statement that the mortgagee had been in possession without acknowledgment of a mortgage title; it must plainly appear that the possession lasted for the statutory period (*y*).

It will be sufficient if the defendant claim the benefit of the "Statute" of Limitations, that expression being equivalent to a claim of the benefit of the statute law of limitations, and therefore of any of the statutes which may meet the defendant's case (*z*).

**1207.** The Statutes of Limitations do not affect the right to redeem goods which are only pledged, the pledgor being entitled to redeem at any time during his life (*a*) (1192).

(*u*) *Edsell v. Buchanan*, 2 Ves. jun. 82; 4 Bro. C. C. 254.

(*v*) *Baker v. Wetton*, 14 Sim. 426.

(*y*) *Green v. Nicholls*, 4 L. J., Ch. 118.

(*z*) *Adams v. Barry*, 2 Coll. 285.

(*a*) *Ratcliff v. Davies*, 1 Bulst. 29; Yelv. 178; *Kemp v. Westbrook*, 1 Ves. 278. By a statute of the Isle of Man, passed in 1835, no deed of mortgage,

upon any lands in the island, shall be held to lapse in law so as to preclude the grantor from redeeming the same. But, at the end of twenty-one years from the date of the mortgage, the mortgagee may sue out judgment and execution, and in virtue thereof may cause the mortgaged premises to be sold for payment of the debt. See *Birnie v. Caystile*, 9 Mo. P. C. 303.

*Of the Persons entitled to redeem.*

1208. The estate in mortgage may be redeemed, not only by the persons specified in the proviso for redemption and their representatives, but also by all persons who have any interest in or lien upon the estate. The reconveyance will be made to the person redeeming or his assigns, or to the persons or uses mentioned in the proviso, or to which the estate was limited at the time of the mortgage. It is often a question of difficulty in which of these latter modes the reconveyance is to be made. In equitable mortgages by deposit, and in other transactions of the nature of securities, but in which there is no express stipulation for redemption, this question can hardly arise by reason of any uncertainty connected with the security; but in formal mortgages, it sometimes happens that the reconveyance is directed to be made to persons or uses different from those to whom or to which it originally belonged, or was subject; and in the absence of express declaration it may be doubtful, whether the variation arose by accident or intention.

1209. Before stating the principles upon which questions of this kind are decided, it may be observed, that with respect to mortgages by tenants in tail, the question of intention, where the limitations are varied, is no longer important, the disposition by way of mortgage, or for any other limited purpose of the tenant in tail, being by statute (*b*) an absolute bar, both at law and in equity, to all persons as against whom such disposition may be made under the same statute, notwithstanding any intention, express or implied, to the contrary, by the deed containing the disposition, except where the disposition is only of an estate *pur autre vie* or for years, absolute or determinable, or where an interest, charge, lien or incumbrance shall be created without an absolute or determinable term or other greater estate for securing the same; in which cases the disposition is, in equity only, a bar, so far as may be necessary to give effect to the mortgage or other limited purpose, interest, charge, lien or incumbrance, notwithstanding any intention, expressed or im-

(*b*) Fines and Recoveries Act, 3 & 4 Will. 4, c. 74, s. 21.

plied, to the contrary in the deed of disposition : so that where an estate, greater than an estate *pur autre vie*, is disposed of by a tenant in tail, the entail is barred, although the intention of creating a limited disposition only be expressly declared by the deed ; but where the estate is only *pur autre vie*, or for one of the yet smaller interests mentioned in the latter part of the section, the estate tail will be only barred *pro tanto* : and thus, as has been observed (*c*), the statute denies effect to the express intention of confining the operation of the deed in one case, and to the express intention of extending it in another. The statute does not, however, it is added, affect an express limitation of the old or any other uses which the tenant in tail may choose to create by the same deed.

1210. The first principle by which Courts of Equity have been guided, in questions arising out of a variation of the right of redemption, is, that, a mortgage being nothing more than a transaction for raising a loan, there is a presumption against an intention to alter the previous rights of the parties, further than is necessary to effect that object. The mere reservation, therefore, of the equity of redemption, in a manner different from the former ownership of the estate, whether it be made expressly or by a declaration (where the mortgage is made in exercise of a power of appointment) (*d*), that the appointment shall be void on payment of the money, is considered (fraud not being in question) to arise from inaccuracy or mistake, which may be explained and corrected by reference to the state of the title as it stood before the mortgage. Hence, if on a mortgage in fee by a mortgagor so seised (*e*), the redemption be reserved to him, and the heirs of his body, it will still *primâ facie* follow the former title ; and if husband and wife mortgage the wife's land (*f*), the equity of redemption will be the wife's, although, by the deed, it be reserved to the husband and his heirs, and though he have kept down the interest. And if the estate have

(*c*) Sugd. R. P. Stat. 199.

(*d*) *Fitzgerald v. Fauconbridge*, Fitzgib. 207.

(*e*) *Innes v. Jackson*, 16 Ves. 367;

and see per Turner, L. J., 3 De G., M. & G. 15.

(*f*) *Brend v. Brend*, 1 Vern. 215; *Ruscombe v. Hare*, 2 Bligh, N. R. 192.

been reconveyed to the husband, his heir will be decreed to convey to the widow (*g*).

To change the ownership, therefore, the court must be satisfied that there was a purpose to do so, beyond the immediate object of the mortgage, and will not generally take the words of the deed as *primâ facie* evidence of such a purpose, though it requires no express declaration of intention (*h*). There must in fact be circumstances to repel the presumption that the parties meant only to make a security, and the circumstances must be stronger, when, as it often happens, the parties stand in the relation of husband and wife, and the wife has released an interest in the husband's estate, or has burthened her own for his benefit.

**1211.** In considering the extent of the rule in question, it must be observed that, though apparently plain, it contains in itself the elements of discord; because circumstances or expressions which to one mind afford conclusive evidence of a change of intention, are to another merely the result of a want of thought in the parties concerned, or of skill in the person instructed to carry out their intentions.

**1212.** It is clear that where there is but one mortgage of an estate under settlement with regular limitations, a simple reservation of the equity of redemption not according to the former ownership, as, for instance, to the mortgagor in fee, or to him, his wife and their heirs, will not overturn the original limitations, but the equity of redemption will still remain subject to them. But it is the opinion of a very eminent writer, that in the converse case, viz. that of an original ownership in fee, and a settlement of the equity of redemption by limitations, the rule should not prevail: and it is evident, that whilst in the one case the variation may easily arise from the oversight or ignorance of the draftsman; in the other, the nature of the reservation almost excludes a presumption of its having been made unintentionally. Hence it has, with reason, been contended, that in a

(*g*) *Stansfield v. Hallam*, 5 Jur., N. S. 1384; 29 L. J. (Ch.), N. S. 173.

(*h*) *Jackson v. Innes*, 1 Bligh, 104; *Lord Hastings v. Astley*, 30 Beav. 260.

case in which the wife's reversion in fee was mortgaged by her and her husband, and the equity of redemption reserved to such uses as they should appoint by deed, executed with prescribed formalities, and, in default of appointment, to the wife in fee; a doubt as to the effect of this limitation was misplaced (*i*).

The presence, where the mortgage itself affects the fee, of a distinct declaration and limitation of the ownership of the estate after satisfaction of the debt, has been held (*k*) sufficient to show that something beyond a mere security was in contemplation.

**1213.** In the leading case (*l*), by which the doctrine under consideration was recognized and explained, it was considered to be important evidence of an intention to revoke the former uses, that the mortgage was for a term only, and that the declaration of the new uses extended to the fee, so that the two estates were quite distinct; the term being at an end upon repayment of the debt, whilst the uses remained to be affected by the re-settlement. And in a much earlier case (*m*) of a mortgage for a term of the wife's lands (subject to which the inheritance was settled upon her for life, with remainder over in tail), the term was held to result for the benefit of the remainderman, although the husband had taken an assignment of it in trust for himself under a proviso in an assignment of the mortgage, and had bequeathed it by his will.

The interest of the person claiming against the mortgage deed has been also considered; and a distinction has been taken between cases where the wife or other person joins in a mortgage for the mere purpose of giving validity to it, and where the security is effected by means of an absolute power over the estate, the exercise of which leaves no equity against the mortgagor in any other person; as, for instance, where the claimant (*n*) against the new limitation of the equity of redemption

(*i*) *Martin v. Mitchell*, 2 Jac. & W. 413; 1 Sugd. Pow. 352, ed. 7.

(*k*) *Rowell v. Whalley*, 1 Ch. Rep. 116. And see *Parker v. Hills*, *Hills v. Parker*, 5 Jur., N. S. 809; 7 id. 833, where the security formed part of com-

plicated partnership arrangements.

(*l*) *Innes v. Jackson*, 16 Ves. 356; *Jackson v. Innes*, 1 Bligh, 104.

(*m*) *Huntingdon v. Huntingdon*, 2 Vern. 487; 1 Bro. P. C. 1.

(*n*) *Anson v. Lee*, 4 Sim. 364.

derived his title from a remainderman whose estate was always liable to be, and was in fact, held to be defeated by the exercise of the power; and who had not joined in the mortgage, and had no other equity.

The decision by which this last distinction was established has been severely criticised (*o*) by Lord St. Leonards. It has, however, been considered by a learned and careful judge to be good law (*p*), and it may be doubted if the arguments against it are sufficient to overturn its validity. In the case in question the mortgagor had by a recovery deed limited the estate (of which, prior to the recovery, he was tenant in tail) to such uses as he should appoint, by deed or will, and in default of appointment to the uses of the will of a former owner. He then mortgaged and provided for a reconveyance to the subsisting uses; but in a subsequent transaction the mortgage was transferred by a deed, admitted to be inaccurately framed, and the reconveyance was then directed to be made to the mortgagor, his heirs or assigns, or to such person or persons as he or they should for that purpose appoint. It was held that the ownership was changed.

The objections of Lord St. Leonards to this decision are, in effect, that the deeds, informally drawn, were executed, not because the mortgagor had changed his intention, but because the mortgagee required his money (*q*); and that the proviso was only an informal declaration of his intention to retain a power over the estate subject to the mortgage. The *intention*, he observes, must govern, and none was declared to defeat the former limitations; and to argue that, because the limitation in the deed is to the party in fee, therefore it must be held to express the intention, is to deny the rule. The last observation is no doubt abstractedly correct; but the correctness of its application may be doubted, because the decision does not appear to have been founded upon any such argument. The Vice-Chancellor (Shadwell) said, "I must suppose, that that which is expressed

(*o*) Treatise on Powers, i. 345, 7th ed.

(*p*) *Whitbread v. Smith*, 17 Jur. 725; 1 Dr. 531. See, however, *Walker v. Armstrong*, 25 L. J. (Ch.) N. S. 406.

(*q*) It was recited that he required his money; but this is so common a recital in transfers of mortgages, that it affords no clue to the real objects of the transaction.

in the deed, was what was intended by the parties to it, *unless there is something in the character of the parties that necessarily rebuts that presumption.*" These expressions are certainly open to criticism, because, as we have seen, the presumption is, not that the words of the deed express the intention, but that, notwithstanding the words of the deed, the ownership of the estate is to remain the same : but, the last words of the sentence, and indeed the whole judgment, show that the Vice-Chancellor had no intention whatever of denying the rule, but that he thought the case was taken out of it by circumstances. And with respect to the other objections, it is not a necessary consequence, that the mortgagor had no intention to alter the ownership, because the alteration was made in a deed relating to the mortgage. It is clear that intention may be inferred from the whole transaction, and that no express declaration of it is necessary (*r*). It seems therefore too much to argue, from the absence of express declaration, that no intention existed. There was in this case a prior mortgage deed from which the language of the later deed varied ; the mortgagor possessed an absolute power over the estate, the exercise of which gave no equity against him to anybody, and he might, if he had chosen to do so, have given himself the fee simple absolutely by the recovery deed.

**1214.** The case of *Anson v. Lee* is also indirectly supported by the old case of *Fitzgerald v. Fauconbridge* (*s*), on the authority of which another distinction has been established, where the security is not by way of mortgage, but takes the form of a trust to raise money, and subject thereto for the maker of the security. In *Fitzgerald v. Fauconbridge*, in which such a deed, executed under a power of revocation, was held to supersede the limitations of a prior settlement made by the then owner of the estate, the distinction from the case of a mortgage, as a mere security for money, was strongly insisted on both by Reynolds, C. B., and by Lord King, and their decision in favour of an altered ownership was followed (*t*), where the lands of the wife, settled upon the husband, wife

(*r*) *Jackson v. Innes*, *supra*.

(*s*) *Fitzgib*. 207.

(*t*) *Heather v. O'Neill*, 2 De G. & J. 399; 4 Jur., N. S. 181, 957.



and children, subject to a joint power of appointment in the husband and wife, were, by the exercise of that power, appointed to the use of such trustees as the husband alone should appoint, and subject thereto upon trust for the husband and wife, and then for the children as before. The husband executed a security in which the trustees concurred, and appointed that they should hold the land upon trust for sale and to secure the repayment of the mortgage money, and subject thereto upon trust for him and his heirs. The concurrence of the trustees was much relied upon in support of the view that the property was altered, as the trustees would otherwise have committed, and been responsible for, a breach of trust.

It is however to be noted, that in *Fitzgerald v. Fauconbridge*, the estate was originally the fee simple estate of the husband, but in *Heather v. O'Neill* of the wife, though by an intermediate settlement the full power over it was given to the husband. It was only on the deed by which the husband executed this power that the decision in the Court of Appeal was founded; but, considering all the circumstances, it seems open to some doubt whether just weight was attached to this former ownership of the wife; according to the remark of Shadwell, V.-C. E. (*u*), that where the husband and wife are dealing with the wife's estate, there is something in the character of the parties to the deed which rebuts the presumption that the equity of redemption was intended to go to the husband's heirs.

**1215.** Another distinction which has been taken is,—that where there have been several mortgages, and by one or more of the prior ones, the equity of redemption has been reserved according to the former ownership, but has been otherwise limited by subsequent deeds, the later dispositions are held to show a deliberate intention to alter the uses. Accordingly, where the mortgages contained trusts for sale, and by the first deed the residue of the purchase-moneys, and the unsold parts of the estates (which were in settlement), were directed to be

held upon the trusts of the settlement, and the proviso for re-conveyance was to a similar effect; but under the other mortgages, the surplus moneys were to be paid, and the re-conveyances to be made to the mortgagor absolutely; this difference of language was expressly mentioned (*x*) as a reason for holding that the ownership was changed. And where (*y*) in several prior mortgages the limitations of the settlement (being limitations to such uses as a husband and wife should appoint, and in default to them successively for life, with remainder to the eldest son in fee) were distinctly referred to or repeated, and by a subsequent security the re-conveyance was directed to be made to the use of the husband and wife, their heirs and assigns, or as they should direct, and the residue of the purchase-money was similarly disposed of, the limitations were at first held to be changed by the latter deed, there being, in addition to the variation of language, these circumstances in favour of the decision,—viz. that, by a contemporary deed, outstanding terms were assigned to attend the inheritance according to the uses and estates limited by the last deed of mortgage, which deed had also the effect of giving to the wife a greater interest in the estate than she would have had under the settlement. This decision was reversed by the full Court of Appeal (*z*). Yet in the absence of a judicial declaration made upon the reversal, that the case as reversed was perfectly consistent with that of *Barnett v. Wilson*, it might have been difficult to discover any solid reason why the limitations should have been changed in that case, and not in *Whitbread v. Smith*.

**1216.** Where the estate mortgaged was the husband's (*a*), and the wife joined to bar dower, and the equity of redemption was limited both in the first and in subsequent securities to the husband and wife and their heirs, and the mortgage contained a declaration that, after payment of the debt, the fine levied

(*x*) *Barnett v. Wilson*, 2 Y. & C. C. C. 407.

(*z*) 18 Jur. 475; 3 De G., M. & G. 727.

(*y*) *Whitbread v. Smith*, 17 Jur. 725; 1 Dr. 531.

(*a*) *Jackson v. Parker, Ambler*, 687.

should enure to the husband and his heirs, the proviso for redemption was held not to operate against the husband's ownership, beyond the wife's right to redeem in respect of her dower.

**1217.** As against a wife joining in the deed to enable the husband to mortgage his estate charged for her benefit (*b*), or joining in mortgaging her chattel leaseholds or other property (*c*), the re-assignment being directed to be made to the husband or to him and the wife jointly, no change will, without further expression of intention, be held to have been made. And where the proviso for redemption is ambiguous, and there is no evidence of any special contract with the wife, it is not sufficient that her concurrence is expressed to be made for the purpose of absolutely releasing and for ever extinguishing her interest (*d*). But where the wife's estate was mortgaged under circumstances which showed a plain intention to create further charges, (the surrender being to uses in favour of the husband, and subject to such powers of sale, and charged with such sums as the mortgagee, at the request of the husband, should appoint, and in default to the use of the mortgagee, subject to redemption by the husband); it was held, that the change of the limitations was clearly effectual against the wife, with respect to further advances made under the deed; independently, it seems, of evidence, that the wife was an active party in the raising of the further advances (*e*).

**1218.** In a case between father and son (*f*), where the former being tenant for life, with remainder as he and his son should appoint, with remainder to the son in fee, joined with the son in a mortgage in fee, with proviso for reconveyance to the father and son, their heirs or assigns, or as they should direct, and a declaration that the father should keep down the interest during his life; the latter clause was held to

(*b*) *Wood v. Wood*, 7 Beav. 183.

(*e*) *Eddleston v. Collins*, 3 De G.,

(*c*) *Clark v. Burgh*, 2 Coll. 221;

M. & G. 1, 15; 17 Jur. 331.

*Pigott v. Pigott*, L. R., 4 Eq. 549.

(*f*) *Hipkin v. Wilson*, 3 De G. & S.

(*d*) *Betton's Trust Estates*, Re, L. R.,

738; 14 Jur. 1126.

12 Eq. 553.

mark an intention that the original ownership should not be changed.

**1219.** Upon the principles laid down in the cases of *Ruscombe v. Hare* and *Jackson v. Innes*, it has also been held (*g*), that where a testator, seised of an equity of redemption to uses to bar dower, devised the estate prior to the 1 Vict. c. 26, and afterwards took a reconveyance to similar uses, the reconveyance did not operate as a revocation of the devise.

**1220.** A mortgage by husband and wife, of an estate of which they are seised in fee by entireties, with a proviso for redemption and reconveyance to them and their heirs, or appointees, enables the wife to concur with the husband in making, on reconveyance, a settlement without fine, altering the former uses, and which will be effectual against a subsequent conveyance by the husband for value after her death (*h*).

**1221.** In the case of a pledge to a pawnbroker, the holder for the time being of the pawn ticket is presumed to be the person entitled to redeem; and, subject to the statutory provisions, the pawnbroker, on payment of the loan and profit, is to deliver the pledge to the person producing the ticket, and is indemnified for so doing, and is not bound to deliver it back unless the ticket be delivered to him (*i*). A person who attempts to redeem, not being entitled or having any colour of title by law to redeem, is guilty of an offence against the act (*j*).

*Of the Wife's and Surety's Rights to redeem.*

**1222.** The equity of redemption of the wife's real estate remains with her in ordinary cases as part of the inheritance. With respect to her chattel leaseholds, if the husband and wife

(*g*) *Flowden v. Hyde*, 2 Sim., N. S. 171; 16 Jur. 512, 823; 2 De G., M. & G. 684.  
(*h*) *Atkinson v. Smith*, 3 De G. & J.

186; 4 Jur., N. S. 1160, 963.

(*i*) Pawnbrokers Act, 1872, ss. 25, 26; and see s. 29.

(*j*) Sect. 34 (3).

join in the mortgage, or if he mortgage the term, and the redemption be reserved to the husband and wife, the equity will belong to them both (*k*). And if the husband become insolvent, the right of redemption will be given to the assignees and the wife (*l*). If they both mortgage, and the husband survive, the redemption will belong to him; for he had full power to alien by the marriage, and upon surviving he shall enjoy against the representatives of his wife (*m*). But if the wife survive, the right of redemption will remain with her (*n*): the mortgage being no alienation, except to the extent of the money borrowed. The wife will not, however, become thus entitled to redeem (*o*), against her husband's creditors, leaseholds settled by the husband after the marriage, and subsequently mortgaged by him and made redeemable by the husband and wife or either of them, their or either of their executors or administrators, with a proviso for quiet enjoyment by the husband; this being a voluntary settlement and it being always in the husband's power to alien.

If the husband join in transferring his wife's mortgage of leasehold, and afterwards reduce the debt by payments in his lifetime, and leave the wife surviving, she may redeem, but upon the condition (*p*) that his estate shall be in the place of the mortgagee as to the sums paid by the husband; even though in the transfer the husband covenanted to pay the debt.

If the wife's equity of redemption of leasehold be settled in trust for herself before marriage with the husband's privity, and the lease come to his hands as assignee of the wife's mortgagee, and he surrender and take a new lease, the wife or her trustees may still redeem it (*q*); because he took the old lease, subject to the same equities under which it was held by the mortgagee; but it would have been otherwise if the

(*k*) Preston on Abstracts, 1, 345.

(*o*) Watts v. Thomas, 2 P. W. 364.

(*l*) Hill v. Edmonds, 5 De G. & S. 603; 16 Jur. 1133.

(*p*) Pitt v. Pitt, Turn. & R. 180.

(*m*) Yong v. Radford, Hobart, 3.

(*q*) Draper's case, 2 Freem. 29, 30; 2 Eq. Ca. Abr. 130.

(*n*) Powell, Mort. 714.

settlement had been made secretly without the husband's privity.

**1223.** A surety is entitled to redeem the estate (*r*) charged, by virtue of his right to avail himself of all the creditors' securities (*s*) (1343); but not where the suretyship is for another debt, or for a distinct part of the same debt, for which the first security is given. Therefore, if a surety by bond for part of a debt, the other part whereof is secured in another transaction by a mortgage, be compelled to pay on his bond, he is not entitled against a subsequent mortgagee of the same estate to the benefit of redemption of the mortgage, in satisfaction of what he has paid on the bond (*t*).

**1224.** A married woman, whose estate has been mortgaged for the benefit of the husband, stands in the position of a surety (*u*), and she may therefore redeem (1116).

The wife ought to sue by her next friend for the redemption of a mortgage of her estate made by her and her husband; but even when he has become bankrupt he retains sufficient interest to sue as a co-plaintiff (*x*).

### *The Right of Joint Tenants, &c.*

**1225.** If the equity of redemption be the property of several persons as joint tenants (*y*) or tenants in common (*z*), one of them may redeem; each as against an incumbrancer, and subject to account with his co-tenant, being entitled to possession and receipt of the whole of the rents.

But it seems that one cannot redeem his own moiety only; for this would be directly contrary to the principle that a mort-

(*r*) *Wade v. Coope*, 2 Sim. 155; *Green v. Wynn*, L. R., 4 Ch. 204.

(*s*) See *Crisp, Exp.*, 1 Atk. 608; *Wright v. Morley*, 11 Ves. 12; *Mayhew v. Crickett*, 2 Sw. 185; *Copis v. Middleton*, T. & R. 224.

(*t*) *Wade v. Coope*, *supra*.

(*u*) *Earl of Kinnoul v. Money*, 3 Sw. 202, n; and decree, 220, n.; *Hudson v.*

*Carmichael, Kay*, 613.

(*w*) *Smith v. Etches*, 1 H. & M. 558; 9 Jur., N. S. 1228, and see 10 *id.* 124.

(*y*) *Wagh v. Land*, G. Coop. 130.

(*z*) *Wynne v. Styan*, 2 Ph. 306. As to the rights of the mortgagee of a tenant in common against his co-tenants, see *Bentley v. Bates*, 4 Y. & C. 182.

gage is to be redeemed entirely or not at all (1033, 1429). A case is on record (*a*), in which one joint tenant is said to have been allowed to redeem his moiety alone; but this is supposed by Mr. Coventry (*b*), to have been decreed by consent.

But in the case of the legal right of redemption of a pawn of chattels, the pawnee is not liable for refusing to re-deliver the pledge upon tender by one of several joint tenants or tenants in common (*c*) (80, 750).

Tenants in common of an equity of redemption cannot in a suit for redemption insist upon a partition against the consent of the mortgagee; partition being a kind of relief not incident to redemption or foreclosure suits (*d*).

1226. If a trust estate be properly mortgaged for the purposes of the trust, the equity of redemption alone remains affected by the trust; the mortgagee, though he be one of the trustees, has the ordinary mortgagee's rights (modified if he be himself the trustee by the rule of equity which forbids him to take advantage of his strict rights to the detriment of the trust estate (*e*) (849)); and the only relief which belongs to the trustees is redemption upon the usual terms (*f*).

*The Rights of Tenants in Tail and for Life, and Remaindermen, and of Tenants by Jointure, Dower and Curtesy.*

1227. The tenant in tail of the equity of redemption may also redeem (*g*), and so may the tenant for life (*h*), though his estate be only equitable (*i*), and whether the security be in the ordinary form or by way of trust for sale on default (*k*). If the tenant for life concur with the tenant in tail in mortgaging for his benefit, upon an agreement for a

(*a*) *Waugh v. Land*, supra.

(*b*) *Pow. Mort.* 342 a, note.

(*c*) *Harper v. Godsell*, L. R., 5 Q. B. 422.

(*d*) *Watkins v. Williams*, 3 Mac. & G. 622; 16 Jur. 181.

(*e*) *Tennant v. Trenchard*, L. R., 4 Ch. 537.

(*f*) *Attorney-General v. Hardy*, 1

*Sim.*, N. S. 338.

(*g*) *Playford v. Playford*, 4 Hare, 546.

(*h*) *Aynsley v. Reed*, 1 Dick. 249; *Evans v. Jones*, Kay, 29; *Earl of Kinoul v. Money*, 3 Sw. 202, n.

(*i*) *Haymer v. Haymer*, 2 Vent. 343.

(*k*) *Wicks v. Scrivens*, 1 J. & H. 215.

re-settlement which becomes inoperative, the parties will be remitted to their former rights. In such a case (*l*) redemption was decreed in favour of the tenant in tail against the devisees of the tenant for life, who had paid off the mortgage, and claimed specific performance of the agreement.

**1228.** The remainderman or reversioner has also as against the mortgagee a good right to redeem, and so long as it was the practice of the court to compel the tenant for life to pay one-third of the debt, redemption might be had against him also; but under the present rule, by which the tenant for life keeps down the interest only, the remainderman or reversioner is not allowed to redeem the tenant for life against his will; for if the latter were himself desirous of redeeming, the result might be that he would have to pay a greater rate of interest to the reversioner on the mortgage, than he could procure for the money with which he might have redeemed (*m*). The tenant for life, therefore, has both in suits by the mortgagee for foreclosure, and by the reversioner or remainderman for redemption, the first option to redeem. And the remainderman cannot redeem (*n*) without the consent of the tenant for life, if the latter have procured an assignment of the mortgage, or if the mortgagee have purchased the interest of the tenant for life. It was said, with reference to the remainderman's right to redeem against the tenant for life, that the trustees to preserve contingent remainders might do so (*o*) for the benefit of those whose estates they were appointed to support.

**1229.** The tenant for life, also, who redeems, cannot compel the remainderman to redeem him, though he or his assignee may bring the remainderman before the court, to be present at the taking of the accounts, and for the establishment of his own security against the estate, paying his costs and adding them to the security; which may be enforced after his death by his representatives.

(*l*) *Playford v. Playford*, supra.

(*m*) *Ravald v. Russell*, Younge, 9.

(*n*) *Id.*; *Raffety v. King*, 1 Keen, 601.

(*o*) *Pow. Mort.* 975, n. (*g*) by Mr. Coventry.



But if the mortgagee of the life estate sue for redemption of prior securities, and the tenant for life die before the hearing, the suit must be dismissed with costs ; unless perhaps the prior mortgagees in possession have received part of their principal out of the life estate. But a case for relief on that ground must be made out and prayed by the pleadings (*p*).

**1230.** Where a wife, being tenant for life of her husband's estate, and also his executrix, and taking a benefit under his will, suffered that benefit to be applied in discharge of a mortgage on the estate, and the mortgage term was assigned to attend the inheritance, she was held (*q*) to have no lien upon the estate ; the transaction amounting *primâ facie* (and no fraud or mistake was proved or alleged) to a gift to the remainderman.

The omission, in taking the accounts in a foreclosure suit, to make the tenant for life keep down the interest on the mortgage (**1558**), and the payment to him of the surplus purchase-money, is fraudulent as against the remainderman, but gives him no right of redemption against the purchaser, whose title is not vitiated, and who is not responsible for the order of the court (*r*).

**1231.** A jointress has a redeemable interest in the whole estate, of a part whereof her jointure consists (*s*). And if she grant a term out of her life interest, though it be for ninety-nine years, if she so long live, her reversion will yet attract the equity of redemption (*t*).

**1232.** A dowress also may redeem a mortgage for a term of years (*u*). And women married subsequently to the 31st December, 1833, being entitled (*v*) to dower out of equitable,

(*p*) *Riley v. Croydon*, 2 Dr. & S. 293; 10 Jur., N. S. 1251.

(*q*) *Toplis v. Von der Heyde*, 4 Y. & C. 173.

(*r*) *Blake v. Foster*, 2 Ba. & Be. 387, 565.

(*s*) *Howard v. Harris*, 1 Vern. 33; and *Browne v. Edwards* (R. L. 1681, fol. 260, cited there).

(*t*) *Brend v. Brend*, 1 Vern. 213.

(*u*) *Palmer v. Danby*, Eq. Ca. Abr. 219, expl. 2 P. W. 716.

(*v*) 3 & 4 Will. 4, c. 105.

and partly equitable and partly legal estates, it follows that where the right to dower exists they may also redeem mortgages in fee. But as to those married before that day, they cannot generally redeem (*w*) mortgages in fee, made before their marriage; because they are not dowable out of the equity of redemption of such mortgages; nor can they redeem mortgages made subsequent to their marriage where they have barred their dower (*x*). It seems, however, that if a woman join in barring her dower to enable her husband to mortgage, in consideration whereof he agrees that she shall have the redemption; this agreement will be upheld so far as to give her the dower which she barred; but not to give her the whole equity against subsequent mortgagees of the husband (*y*). Nor will the fact of her joining to extinguish her dower (the equity of redemption being limited to her and her husband jointly) afford a presumption of an agreement, that in case of surviving her husband, she shall have the whole equity of redemption (*z*).

If the dowress paid more upon redemption than her proportion of the principal money, she had a right as to the residue to hold the lands over until she was reimbursed (*a*). At present both dowress and jointress would be in the position of an ordinary tenant for life who keeps down the interest, and if he will redeem is presumed to be a creditor for the amount, unless he show an intention to merge the debt (1308).

**1233.** The husband surviving the wife and having had inheritable issue (where that is required) is tenant by the curtesy of the equity of redemption of her estate, mortgaged in fee before her marriage, and may redeem; for though the wife has not that actual seisin of the freehold during the coverture which the law requires (*b*) to constitute a tenancy by the curtesy (her possession being in fact but that of the mortgagee), yet her right to the equity of redemption being

(*w*) *Dixon v. Saville*, 1 Bro. C. C. 326; *Chaplin v. Chaplin*, 3 P. W. 229;

*Williams v. Lambe*, 3 Bro. C. C. 264.

(*x*) *Powell*, Mort. 286, note (*s*).

(*y*) *Dolin v. Coltman*, 1 Vern. 294.

(*z*) *Jackson v. Parker*, Ambl. 687.

(*a*) *Palmer v. Danby*, 1 Eq. Ca. Abr. 219; Pre. Ch. 137.

(*b*) Co. Litt. 80 a.

clothed with possession and with receipt of the profits, there is an actual seisin of an equitable estate, equivalent in the view of a Court of Equity to such legal seisin and sufficient to support the husband's right (c).

And there may be curtesy of the wife's trust estate of inheritance, although the rents and profits be given for her separate use (d). But if there be a direction that the trustees shall convey to the use of the wife for her life, and after her decease in trust for the heirs of her body, there will be no curtesy, because the trust is executory only, and the wife entitled to no more than a life estate (e).

The husband is equally entitled (f) to curtesy of the trust estate, though the wife died without having been in possession or receipt from the trustees of the rents and profits, if she were entitled; their possession not being, as against her, adverse.

### *The Rights of Guardians and Committees.*

**1234.** The guardian of an infant heir may redeem a mortgage out of the rents of the descended estate; but not, it is said, any real incumbrance, which is not a direct charge upon the estate (g). It is apprehended, that, under their present constitution, a judgment debt on the completion of the charge (156) falls within the rule which enables guardians to redeem (h).

**1235.** Committees of a lunatic may also redeem out of the rents and profits (i), and, if threatened with foreclosure, it is said they may do so, without leave of the court, out of the personal estate of the lunatic (k); though the prudent and proper course is to obtain an order for the purpose.

Both guardians and committees are by statute authorized

(c) Bunb. 347; 2 Eq. Ca. Abr. 594;  
Casburne v. Inglis, 2 Jac. & W. 194;  
S. C.; 1 Atk. 603.

(d) Roberts v. Dixwell, 1 Atk. 607;  
Morgan v. Morgan, 5 Mad. 408.

(e) Roberts v. Dixwell, supra.

(f) Stone v. Godfrey, 18 Jur. 162.

(g) Palmes v. Danby, Pre. Ch. 137.

(h) Rolleston v. Morton, 1 Dru. &  
War. 197; Boyle, Exp., 17 Jur. 979,  
981; 3 De G., M. & G. 515.

(i) Grimstone, Exp., Ambl. 706.

(k) Powell, Mort. 285 a, note (r).

to redeem land tax (*l*); but it was said by Lord Eldon, that committees should not do so without the express authority of the court (*m*).

*The Rights in cases of Forfeiture and Escheat.*

**1236.** The crown may redeem such estates as vest in it by forfeiture (*n*). But if a mortgaged estate be seized by the crown upon the mortgagor's outlawry for high treason and be granted to another, and afterwards the outlawry be reversed, upon the reversal the lessee is restored (*o*) to all that was not answered to the crown, i. e. to all but the mesne profits. His right of redemption, therefore, returns to him (*p*).

The rule, that there is no escheat of a trust estate (*q*), applies to the equity of redemption of a mortgage in fee; for the mortgagee is the legal tenant, whose service is all that the crown, or other lord of the fee, can of right require (*r*). The equity of redemption in such a case becomes extinguished in the estate of the mortgagee, who does not, however, take it absolutely, but as assets for payment of the debts of the mortgagor, whose legal personal representative, therefore, has a right to redeem (*s*); which right has been held to remain intact after more than twenty-one years, in respect of the possibility that a debt on covenant may still arise, or may be then unbarred by lapse of time. But although in this particular there be no difference between an ordinary trust estate and an equity of redemption, yet a difference has been made (but has not altogether passed without question) where the mortgage is for a term only; in which case, if the mortgagor die without an heir, the reversion in fee escheats to the crown or other lord. Now here it is held (*t*), that as the lord, taking the fee by

(*l*) 53 Geo. 3, c. 123, s. 2.

(*m*) Phillips, Exp., 19 Ves. 124.

(*n*) Attorney-General v. Crofts, 4 Bro. P. C. 136.

(*o*) Rockley v. Wilkinson, Sir T. Jones, 100; Eyre v. Woodsine, Cro. Eliz. 278.

(*p*) Peyton v. Ayliffe, 2 Vern. 312.

(*q*) Burgess v. Wheate, 1 Eden, 177;

1 W. Bl. 123.

(*r*) Beale v. Symonds, 16 Beav. 406.

(*s*) Id. Lord Eldon seems to have thought that the mortgagee might refuse to be redeemed; but does not speak with reference to debts. (Gordon v. Gordon, 3 Sw. 470.)

(*t*) Viscount Downe v. Morris, 8 Harb. 394; 13 L. J., Ch. 337.

escheat in an ordinary case, also becomes entitled, in equity, to the benefit of a term of years attendant on the inheritance (*u*), so he shall have the equity of redemption of a term of years, which is also an estate or interest in the land itself (1166), and as such is drawn along with the freehold, giving the lord a right to complete his title and to make the term attendant on the inheritance, by redeeming the mortgage. And if the (*x*) mortgagor have died since the coming into operation of the statute 3 & 4 Will. 4, c. 104 (by virtue of which the lord holds (*y*) the escheated land as assets for payment of the last tenant's debts), he gets a right to redeem by means of the statute also; for he may discharge the estate by paying the debt, and will then be entitled to an assignment of the term by which it was secured.

It seems to have been assumed, in another case (*z*), that the equity of redemption of a term might pass with the inheritance to the crown; but it being admitted that the estate was of less value than the debt, it was argued that the mortgagor was a bare trustee for the mortgagee, and that the equity would, therefore, not escheat, but might be conveyed, as if the trustee (the mortgagor) had left an heir, by a person appointed by the court under 4 & 5 Will. 4, c. 23, s. 2; but this view was not adopted, and the suit being an administration suit in which the estate might be sold as against the crown, it was directed, by consent of the mortgagee, that he should take the estate in satisfaction of the debt, with liberty to apply to the crown for a grant of the fee simple (850).

**1237.** The reservation of the equity of redemption to the mortgagor, his heirs, executors, administrators and assigns, does not prevent the lord from taking by escheat (*a*); for he becomes entitled to an attendant term under the like form of limitation; and takes by escheat, as an assign in law, that which belongs to the inheritance; as in the case of (*b*) a rent

(*u*) *Thraxton v. Attorney-General*,  
1 Vern. 340.

(*w*) *Viscount Downe v. Morris*, *supra*.

(*y*) *Evans v. Brown*, 5 Beav. 114;  
*Hughes v. Wells*, 16 Jur. 927.

(*z*) *Rogers v. Maule*, 1 Y. & C. C. C.  
4; and decree there.

(*a*) *Viscount Downe v. Morris*, *supra*.

(*b*) *Co. Litt.* 215 a.

reserved to the lessor and his heirs, for which the lord taking by escheat may distrain.

Prior to a modern statute, the rule concerning the rights of the lord taking the mortgaged estate by escheat of the *mortgagee*, was (c), that in the case of fee simple lands the lord took subject to the equities of the tenant, because the latter had full power to create them without the lord's consent; but as to copyholds and customary freeholds, the title to which is perfected by admission, the lord was not bound unless by admission he assented to the acts of the tenant, and then so far only as he had express or constructive notice of such acts. The lord, therefore, would take absolutely and irredeemably (d) an estate to which the tenant, on whose death the escheat happened, was admitted absolutely, and without notice on the court roll, or to the steward or deputy steward, of any condition: but if the surrender were only made subject to the trusts of a deed referred to therein (e), the lord would be bound by this or any other constructive notice, and the right of redemption would remain open against him. As against the crown, it was said by Lord Hale (f), that only an *amoveas manum* lay, and no right to redeem.

No land, stock, or chose in action (g), vested in any person on any trust, or by way of mortgage, or any profits thereof (save as to the beneficial interest therein of any such trustee or mortgagee (h)), will escheat or be forfeited to the crown or any corporation or person, by reason of any attainder or conviction of such trustee or mortgagee; but will remain in the trustee or mortgagee, or survive or descend, as if there had been no attainder or conviction.

### *The Right of the Mortgagor's Assignees.*

**1238.** The assignees of the mortgagor (i) may generally redeem, whether they claim as subsequent mortgagees or by

(c) *Weaver v. Maule*, 2 R. & M. 97.

(d) *Attorney-General v. Duke of Leeds*, 2 Myl. & K. 343.

(e) *Weaver v. Maule*, *supra*.

(f) *Pawlett v. Attorney-General*, Hard. 465; 1 Eq. Ca. Abr. 315; and see *Rogers v. Maule*, 1 Y. & C. C. C. 4.

(g) *Trustee Act*, 1850, 13 & 14 Vict. c. 60, s. 46, replacing the repealed enactments of 4 & 5 Will. 4, c. 23.

(h) Sect. 47. See *Lowe, Re*, 12 Jur. 638.

(i) *Bunb.* 347; 2 Eq. Ca. Abr. 594; *Thorne v. Thorne*, 1 Vern. 182; *Rand*

absolute assignment, and as well under a voluntary conveyance as otherwise; for a voluntary conveyance is only void against a subsequent mortgagee to the extent of the mortgage (*k*). The equity of redemption, therefore, remains in the grantee, even where the voluntary instrument contains a power of revocation (*l*). The purchase by the mortgagee of the interest of the heir at law of the settlor, of course puts him in no better position.

**1239.** The right of the *puisné* mortgagee to redeem is not, however, like that of the mortgagor or his representatives, an absolute right, but is only ancillary to his right to work out his remedy against the mortgaged estate by foreclosure; which remedy, being out of the power of the *puisné* mortgagee in the first instance, by reason that the prior incumbrance stands in his way, he is allowed to remove it by redemption. Hence (*m*), no *puisné* incumbrancer can redeem a prior mortgagee adversely, without bringing the mortgagor before the court (**1428**) for the purpose of completing his remedy by foreclosure; and if by any means, as by a covenant not to foreclose till the arrival of a certain period, the *puisné* mortgagee have precluded himself from pursuing that remedy against the mortgagor, he cannot insist that upon paying off the first mortgagee, the latter shall assign the mortgage to him (*n*); for being unable to seek relief against the mortgagor by reason of his covenant, he may not bring him forward at all, and without him the suit will fail as against the prior mortgagee also. Yet the *puisné* incumbrancer is not, in such a case, altogether without remedy, for the court will restrain the first mortgagee from depriving him of his right by a

*v. Cartwright*, 1 Ch. Ca. 59. It has been doubted whether a mortgagor can sue for redemption after conveying his equity to trustees for sale, or whether he should not seek to set aside a sale alleged to be improper. (Per Turner, L. J., in *Manser v. Dix*, 3 Jur., N. S. 252; 8 De G., M. & G. 713.)

(*k*) *Perkins v. Walker*, 1 Vern. 97; *Reeve v. Hicks*, 2 Sim. & St. 403.

(*l*) *Thorne v. Thorne*, *supra*.

(*m*) *Fell v. Brown*, 2 Bro. C. C. 276; *Falk v. Clinton*, 12 Ves. 48; *Farmer v. Curtis*, 2 Sim. 466; *McDonough v. Shewbridge*, 2 Ba. & Be. 555; *Woodcock v. Mayne*, cited 12 Ves. 59.

(*n*) *Ramsbottom v. Wallis*, 5 L. J., Ch., N. S. 92; *Coote*, Mort. App. 576, ed. 3; *Rhodes v. Buckland*, 16 Beav. 212.

sudden sale of the estate, where it appears that the sale is about to be made for that purpose (*o*).

But this rule will not justify the first mortgagee in insisting (*p*) upon being redeemed by no other means than the ordinary course of the court, where he has filed a bill of foreclosure, and the *puisé* mortgagee has thereupon tendered the principal and interest, and has offered to deposit a sum for costs until the amount due can be ascertained; and the refusal of the mortgagor to concur will not justify the first mortgagee's refusal to assign under such circumstances.

**1240.** If the grantee under a voluntary deed—as a jointress under a settlement made after marriage—will redeem, it must be upon the terms of also redeeming a mortgage subsequent to the deed under which the equity of redemption is claimed, although the subsequent mortgagee had notice of such deed; for the notice does not help the voluntary grantee against the subsequent purchaser (*q*).

**1241.** The assignee of a subsequent mortgagee, after a decree in a foreclosure suit in which his assignor's interest has been bound, ought not to file a new bill against the other parties to the foreclosure suit, praying to redeem the prior and to foreclose the subsequent incumbrancers; and against those parties such a bill will be dismissed with costs (*r*). But against the assignor, an inquiry will be directed of what is due to the assignee for principal, interest and costs, upon payment whereof the assignee will be decreed to reconvey, but in default of payment the assignor will be foreclosed; and in case of such foreclosure the assignee will be entitled to the benefit of the former decree, and to stand in his assignor's place and use his name in prosecuting that suit, with liberty to attend the taking of the accounts in the meantime. It seems, therefore, that an assignee in the above position should pray foreclosure against his assignor, and the benefit of the former decree.

(*o*) *Rhodes v. Buckland*, *supra*. 65.

(*p*) *Smith v. Green*, 1 Coll. 555.

(*q*) *Gardiner v. Painter*, Sel. Ch. Ca.

(*r*) *Booth v. Creswicke*, 8 Sim. 352;

8 Jur. 323.



If, however, the assignee have but the dry right to the equity of redemption, and no beneficial interest, or right to the beneficial interest, which he can exercise on behalf of those really entitled, he will not be permitted to redeem. Therefore a bill by an assignee of the equity of redemption, upon trust to sell and discharge debts of the mortgagor, and pay him the surplus (the debts having been paid without any execution of the trusts, and more than forty years having elapsed), was dismissed with costs, the trusts being held to have been determined, and the power to redeem, as ancillary to them, to have consequently failed (*s*).

**1242.** The lessee of the mortgagor (*t*), claiming under a beneficial lease, though it be made after the mortgage, may redeem, the lease being good against the mortgagor. And in Ireland under the Ejectment Statutes, if the trustee of a leasehold interest refuse to redeem upon eviction for non-payment of rent, the *cestui que trust* may do so (*u*).

*The Rights of Judgment and other Creditors.*

**1243.** Pernors of profits and judgment creditors (*v*), who have issued execution (*x*), may also redeem; but a judgment creditor, who cannot obtain delivery of the land under his elegit, and comes to enforce his equitable rights, is not bound to redeem, but is entitled to equitable execution (*y*). The judgment creditor does not lose his lien on the estate as against the assignees (*z*) of the bankrupt debtor, or as against a purchaser (*a*), under a decree of the court, by not coming in under the commission in the one case, or, in the other, by not

(*s*) *Owen v. Flack*, 2 Sim. & St. 600.

(*t*) Per Lord Mansfield, *Keech v. Hall*, Doug. 21; 2 Cru. Dig. 83.

(*u*) *Malone v. Geraghty*, 3 Dru. & War. 246, 263; 1 H. L. C. 81.

(*v*) *Bunb.* 347; *Stonehewer v. Thompson*, 2 Atk. 440; *Blagrove v. Clunn*, 2 Vern. 576; *Sharp v. Earl of Scarborough*, 4 Ves. 538; *Henry v. Smith*, 2 D. & War. 390.

(*x*) *Earl of Cork v. Russell*, L. R., 13 Eq. 210; but see *Mildred v. Austin*, L. R., 8 Eq. 220.

(*y*) *Wells v. Kilpin*, L. R., 18 Eq. 298; but see *Beckett v. Buckley*, 17 Eq. 435.

(*z*) *Stonehewer v. Thompson*, *supra*.

(*a*) *Barrett v. Blake*, 2 Ba. & Be. 357.

proving his debt before the master in pursuance of an advertisement for that purpose; his legal remedy remaining the same as before, and nothing being lost but the benefit which might have been obtained from the produce of the sale. But if by reason of the legal estate being out of the debtor, when the judgment was obtained, the judgment creditor could not proceed under an *elegit*, then it is said a Court of Equity would refuse its assistance against the purchaser under a decree of the court, and would not suffer the judgment creditor to redeem.

If upon the issuing of the execution, which the law concerning judgments formerly required (*b*) to complete the judgment creditor's right against leaseholds and other chattels, the writ were returned without having been put in force, the judgment creditor lost his priority over, and was driven to redeem subsequent incumbrancers (*c*), because the writ after its return was not binding; and this appears to be now the rule (*d*), although under 1 & 2 Vict. c. 110, s. 13, the judgment creditor's right to redeem was complete, without suing out execution (*e*).

**1244.** If an estate be settled to uses, with a proviso that on the happening of a certain event, and payment of a sum of money, the uses shall cease, and the estate be for the heirs and assigns of the settlor; there (*f*), if the money be not paid within the limited time after the death of the settlor, a judgment creditor may pay it and have the benefit of the redemption; for the heirs or executors of the settlor cannot omit to do it to the prejudice of a fair creditor.

**1245.** The general creditors of the mortgagor may also in many cases acquire an interest in the mortgaged estate, which will give them a right of redemption. Thus a creditor who has obtained a decree for sale of the estate in a creditor's suit, may, by a supplemental suit, have a decree for redemption against a

(*b*) *Shirley v. Watts*, 3 Atk. 200;  
*Angell v. Draper*, 1 Vern. 399. See  
*King v. Marissal*, 3 Atk. 192.

(*c*) *Williams v. Craddock*, 4 Sim.  
 313.

(*d*) See 27 & 28 Vict. c. 112, s. 1.

(*e*) *Harris v. Davison*, 15 Sim. 128.

(*f*) *Frederick v. Aynscombe*, 1 Atk.  
 392; and see *Blagrove v. Clunn*, 2  
 Vern. 576.

person holding and claiming a lien on the title deeds, although such person was not a party to the creditor's suit;—the effect of the decree for sale being to give the creditor an interest to sustain the supplemental suit, that he may get the benefit of that decree (*g*).

And where pending a suit by creditors for a sale of the estate, the mortgagee fraudulently obtained a decree for foreclosure, it was held that they should redeem him notwithstanding the decree (*h*).

**1246.** Creditors were also allowed (*i*) to redeem (after many years' possession) another creditor, who, upon the mortgagee's obtaining a decree for foreclosure, had paid off the debt, and agreed that the others might redeem him by paying the money on a certain day, on the ground, that the agreement operated as a mortgage, and gave a new equity of redemption to the creditors. A specialty creditor in equity may also redeem; as a wife by virtue of a bond given her by her husband before marriage, and conditioned to leave her a sum of money if she survived him (*j*); though the bond be released at law by the marriage, she may redeem the husband's mortgaged estate, and hold over both for the bond debt and what she paid for redemption.

So, if by agreement with the mortgagor, the creditor become in effect assignee of the equity of redemption; as where a creditor agreed with the mortgagor to give up his securities, and assist in a suit which the mortgagor was then prosecuting against the mortgagee for an account and redemption, receiving in return a lien upon the securities in the hands of the latter; it was held, that the creditor's character was that of an assignee, and his proper relief, not specific performance, but an account of the transactions between the mortgagor and mortgagee, and redemption on payment of what should be due upon the mortgage in case the mortgagor should not pay the plaintiff the amount due to him (*k*). So, in the case of creditors being trustees under a

(*g*) *Christian v. Field*, 2 Hare, 177.

(*h*) *Soley v. Salisbury*, 9 Mod. 153;  
2 Eq. Ca. Abr. 600.

(*i*) *Exton v. Greaves*, 1 Vern. 138.

(*j*) *Acton v. Pierce*, 2 Vern. 480;  
Pre. Ch. 237.

(*k*) *Hartley v. Russell*, 2 Sim. & St.  
244.

deed for payment of debts. And if a debtor (*l*), believing himself to be owner in fee subject to mortgages, convey all his interest in the mortgaged estate to trustees for the benefit of creditors; though he have no interest at the time, yet if he afterwards become entitled to the fee, he cannot deprive the creditors of an estate which he sold them for valuable consideration, viz. a release from his debts. Therefore they have a right of redemption prior to his.

**1247.** But not the creditors themselves coming in the first instance, as a matter of course, because the general principle is, that those only are entitled to redeem who have a right to call for the legal estate.

However, if creditors or legatees can make out that the trustees are colluding with the mortgagee to prevent the recovery of their claims, or that they were called on to redeem and refused to do so, or that they are unsafe, it seems that they may themselves redeem (*m*).

And if the bankruptcy trustee refuse to bring an action to redeem for the benefit of the estate, any creditor may do so under peril of costs (*n*). But liberty to redeem will be given to the trustee first and then to the plaintiff.

**1248.** The sequestrators of a mortgaged estate have been allowed to redeem (*o*).

### *The Right of the Trustee in Bankruptcy.*

**1249.** The trustee in the bankruptcy or liquidation of the owner of the equity of redemption may redeem his mortgages. But the special power given by the statutes which preceded that of 1869, to tender the money or perform the condition, before the time fixed, is not included in that act.

Where an order of adjudication has been made upon the petition of a secured creditor, who has been admitted as the

(*l*) *Smith v. Baker*, 1 Y. & C. C. C. 223.

(*m*) *Troughton v. Binkes*, 6 Ves.

573. Per Lord Wynford, *White v.*

*Parther*, 1 Knapp, 229.

(*n*) *Franklyn v. Fern*, Barn. 30, 32; 2 Eq. Ca. Abr. 605.

(*o*) *Fawcet v. Fothergill*, Dick. 19.

petitioning creditor, to the extent of the balance of the debt due to him, after deducting the amount estimated by the creditor as the value of his security, he shall, upon the application of the trustee made within two months after the date of the order of adjudication, give up the security to the trustee upon the payment to him of the value so estimated; and where the trustee does not so apply within such term, he shall be considered to have waived his right to redeem the security by payment of such estimated value (*p*). The bankrupt cannot redeem in his own name (*q*). And where his debts, and the costs, charges and expenses of the bankruptcy have been paid, he may sue in respect of his right to the surplus (*r*).

### *The Rights of Devisees.*

1250. The devisee of the whole or of part of the equity of redemption, under a devise made either after or before the condition broken, may redeem (*s*); and even before the statute 1 Vict. c. 26, he might redeem a mortgage made after the date of the will, the revocation being only *pro tanto*. The devise of the inheritance carries with it the right to redeem a mortgage for a term; therefore if a mortgagor, by his will, direct payment of the mortgage and assignment of the mortgage term to one, but devise the fee to another, the devisee of the fee shall still redeem the term (*t*). And a devisee may redeem against a person claiming as purchaser of the equity of redemption from a pretended heir, if such purchaser had notice of the pendency of a suit to establish the will (*u*); for having notice, he is bound by the decree establishing the will. When a devised estate is subject to a settled charge, it is a question of intention, to be gathered from the instrument creating the charge, whether the owner of the estate may or may not redeem before the whole charge becomes divisible (*v*).

(*p*) Bankruptcy Rules, 1870, 117.

(*q*) Spragg v. Binkes, 5 Ves. 583.

(*r*) Bankruptcy Act, 1869, s. 45;  
Wearing v. Ellis, 6 De G., M. & G.  
596.

(*s*) Saunders v. Hawkins, 8 Vin.

Abr. 156; 2 Eq. Ca. Abr. 771; Hall v.  
Dench, 1 Vern. 342; 1 Vict. c. 26, s. 3.

(*t*) Amhurst v. Litton, 2 Eq. Ca.  
Abr. 603; 5 Bro. P. C. 254.

(*u*) Finch v. Newnham, 2 Vern. 216.

(*v*) Marsh v. Keith, 29 Beav. 625.

Legatees whose legacies are charged on the mortgaged estate may redeem (*x*).

*The Rights of Real and Personal Representatives.*

**1251.** At law if a feoffment be made in mortgage,<sup>1</sup> upon condition that the feoffor shall pay a sum at the day fixed in the mortgage, though he die before the day his heir may pay or tender the money, and may enter if the feoffee refuse to receive it, though the heir was not mentioned in the condition; because he has an interest of right in the condition, and the intent was only that the money should be paid at the day. But the feoffee is not bound to receive tender made by a stranger of his own head who has not any interest. And if the condition be merely for payment to the feoffee, no day being fixed, a tender by the heir will be void, because the feoffor has his whole life for payment, and at his death the time for payment is past (*y*).

**1252.** The heir of the person entitled to redeem, whether under the ordinary rules of descent, or by custom (*z*), has the same right to redeem as his ancestor (*a*); and it has been held (*b*), where the latter had not been heard of for thirty years, that a presumption of his death arose upon which his heir apparent might redeem. The assignee of an heiress at law and her husband, whose title depended upon the death of one who had gone beyond seas, and had not been heard of for a similar period, is also stated (*c*) to have been allowed to redeem, it being observed by Lord Talbot, C., that, as the mortgagee has but a conditional interest in the land, and can only be redeemed on payment of principal, interest and costs, such evidence [presumption] of death would be sufficient. There appears to be no recent case from which it can be stated with certainty, what is the shortest period of absence without

(*x*) *Faulkner v. Daniel*, 3 Hare, 199; 1 Atk. 621.

*Batchelor v. Middleton*, 6 Hare, 78.

(*y*) Litt. ss. 334, 337.

(*z*) *Fawcett v. Lowther*, 2 Ves. 304.

(*a*) Bunb. 347; *Hawkins v. Chappell*,

(*b*) *Anon.* 2 Eq. Ca. Abr. 594, marg. note.

(*c*) *Masten v. Cookson*, 2 Eq. Ca. Abr. 414; but very ill reported.

tidings, after which the heir apparent of the mortgagor would at the present day be suffered to redeem. The presumption of the continuance of life is considered to cease at the expiration of seven years from the time when the absent person was last heard of; which rule is generally considered to be by analogy to the statutes 1 Jac. 1, c. 11, for preventing polygamy, and 19 Car. 2, c. 6, concerning certain estates for life (*d*). And property of such persons will be distributed on such a presumption (*e*), although formerly it seems to have been considered that the lapse of a longer period was necessary.

In a case in which a period of ten years was adopted (*f*), considerable exertions had been made to obtain evidence; and the person had disappeared under circumstances which made his death not improbable. Absence without tidings has been acted upon in other cases (*g*), where the periods have been thirteen years and upwards, and inquiries had been made unsuccessfully to establish the fact of death. After an absence of twenty-seven years, with evidence of similar inquiries, administration with the will annexed has been granted by the Ecclesiastical Court (*h*). And after less than nine years, a person who would have been entitled to sue, in case of the

(*d*) See *Doe v. Nepean*, 2 M. & W. 894; 5 B. & Ad. 86; Best on Presumptions; Hubback, Ev. of Suc. 170; Phillips, Ev. i. 449, ed. 9; Taylor, 199, ed. 6. But the statutes probably adopted an earlier presumption, of which there are traces. *Action of dower*. Plea that the husband was still living. The wife produced witnesses (one of whom was the brother of her husband), "whose testimony," says Dyer, "tended to no plain proof, but by conjectures and presumptions. That the husband departed the realm in the first year of Queen Mary, on account of religion, and was a minister, and for those seven years had been absent. And in the time of this religion here restored he had not returned, nor no merchant of that country, to wit, Germany, or Englishmen that travel in those parts give account of his being alive, nor no token

thereof; p. q. ils conclude in lour consciences that they rather think him dead than alive." And no witnesses being produced on the other side, judgment was given for the demandant. (*Thorn v. Rolff*, Pasch. T., 2 Eliz.; Dyer, 185; Anderson, 20; and shortly in *Moore*, 14.) The rule seems to have been recognized in this case; but the actual period was a little less than seven years, inasmuch as Mary came to the throne 6th July, 1553, and the case was heard in Easter Term, 2nd Eliz. (1560).

(*e*) *Phéné's Trusts*, Re, L. R., 5 Ch. 139.

(*f*) *Dowley v. Winfield*, 14 Sim. 277.

(*g*) See 1 Y. & C. C. C. 117; 17 Jur. 570; 6 Ves. 605; 8 Sim. 443; 7 Ves. 590.

(*h*) *Dean v. Davidson*, 3 Hagg. Eccles. R. 554.

death of the absent person, was allowed to do so for the security of the property (*i*). But the court has refused to presume death after no tidings had been had for upwards of nineteen years, though considerable inquiry had been made, where the correspondence of the absent person with her family ceased under circumstances which made it probable that she would no longer wish to continue it; namely, after they had reproached her for having changed her religion: it being observed, that the presumption of death rests on the probability that the person, if alive, would have communicated with his friends (*k*).

The rule does not extend to any presumption as to the particular time of death within the seven years, the onus of proving which rests upon the person whose claim is founded upon it (*l*). In some cases, upon evidence more or less conclusive, it has been inferred that death took place at or before a certain time. Thus, it was inferred that a person who had been absent twenty-three years, and who at the time of his disappearance was in very bad health, and was to have returned in six months, died within from five to six years from the commencement of absence (*m*). And where persons were on board a vessel which sailed on a voyage from the West Indies during the hurricane months, and was never more heard of, and there was evidence of tempestuous weather, which she might well have fallen in with, their deaths were inferred to have happened during that voyage (*n*). And Sir L. Shadwell, V.-C. E., went so far as to hold, that a person presumed to be dead, after an absence of about ten years, might be inferred to have died in the lifetime of his father, which took place about twenty months only from the time when the absent person was last heard of; although there seemed to be no special circumstances to warrant such an inference (*o*).

(*i*) *Danby v. Danby*, 5 Jur., N. S. 54.

(*k*) *Bowden v. Henderson*, 2 Sm. & G. 360.

(*l*) *Nepean v. Doe*, 2 M. & W. 894; 5 B. & Ad. 86; *Lamb v. Orton*, 6 Jur., N. S. 61; *Phéné's Trusts*, Re, L. R., 5 Ch. 139; *Lewes' Trusts*, Re, 6 Ch. 356;

*Walker*, Re, 7 Ch. 120; *Underwood v. Wing*, 4 De G., M. & G. 633; *Wing v. Angrave*, 8 H. L. C. 183.

(*m*) *Webster v. Birchmore*, 13 Ves. 362.

(*n*) *Sillick v. Booth*, 1 Y. & C. C. C. 117.

(*o*) *Dowley v. Winfield*, 14 Sim. 277;



But it seems, that neither at any particular period, nor at all, will death be presumed even after so long an absence as twenty-three years, without any certain tidings of his existence, unless diligent inquiries have been made to discover the missing person (*p*).

**1253.** Where the ownership of property is determined to be altered on the presumption of death, it is usual (*q*) to require, from the person declared to be entitled, security to refund in case of the re-appearance of the absent owner (*r*).

**1254.** A *primâ facie* title to the equity of redemption is

see *Ommaney v. Stilwell*, 23 Beav. 328; *Tindall's Trusts*, Re, 30 Beav. 151.

(*p*) *Creed*, Re, 1 Drew. 235.

(*q*) *Dowley v. Winfield*, 14 Sim. 277; *Bailey v. Hammond*, 7 Ves. 590.

(*r*) The *Code Napoleon* carefully provides for the destination of the property of absent persons, and specifies minutely the several periods at which the presumption of death arises from absence, and by lapse of time becomes converted into judicial certainty. A person deemed to be absent, within the meaning of the law, is described as one whose residence is unknown, of whom there are no tidings, and whose existence is therefore uncertain. The first period fixed is that of "presumption of absence." It comprises the interval between the disappearance or last news of the absent person and the "declaration of absence," and it lasts four years, in case the absent person has left no power of attorney, but otherwise ten years. Application may then be made for the "declaration of absence," but another year must always elapse before that declaration can be made, which is to give time for inquiries by the public officers charged with that duty. The declaration of absence creates provisionally, from the time of the disappearance, all the rights which actual death, if proved, would create absolutely. Such rights may be de-

manded (upon security being given) by the heirs presumptive at the time of disappearance or of the last tidings, by legatees, donees (under certain circumstances), donors, with right of reverter by survivorship, and owners of property of which the absent person had the beneficial enjoyment. At the end of thirty years from the "declaration of absence," or of one hundred from the birth of the absent person, the third period, called order for final possession, commences, and lasts as long as there is any uncertainty as to the existence of the absent person. Real estate may neither be aliened nor mortgaged during the provisional enjoyment; but after the lapse of the thirty or one hundred years' period, the securities are discharged, the property distributed, and the final decree of order for final possession pronounced. Those who enjoy the goods of the absent person must account for a fifth part of the income if he reappear within fifteen years; after that period for a tenth only, and after thirty years' absence they take it absolutely. Provision is also made for the recovery of his property, and the price of so much of it as has been sold, in case of the re-appearance of the owner. *Code Civil*, 112—138; *Mourlon's Rep. Ecr. sur le Code Civil*, 1er Ex. i. 204, &c.

sufficient. Therefore, where the alleged heir proves his descent to the satisfaction of the court, he will be allowed to redeem (*s*) at once, notwithstanding the complicated nature of the pedigree, against a person filling the character of assignee of the mortgage term with notice of the plaintiff's claim, but himself claiming as heir at law; the redemption of the mortgage being the only thing determined by the decree, and the defendant not being prevented from contesting the plaintiff's claim elsewhere. But a person claiming as heir cannot rest his claim upon more than one foundation. So that where a plaintiff, suing as heir (*t*), stated in his bill the purchase by himself of the title of another alleged heir, and he himself being afterwards found not to be heir, filed a supplemental bill claiming thereby the relief first asked for in right of the purchased title, a demurrer was allowed.

**1255.** The heir at law has no other right of redemption than that which is founded upon his property in, and ownership of, the estate (*u*); the conversion of which into personality by the mortgagor, as by an irrevocable conveyance to trustees for the benefit of creditors, with a trust of the surplus for the mortgagor, his executors, administrators and assigns absolutely, will therefore destroy the heir's right to redeem (*x*). And where the deed has thus pointed out the destination of the property, the nonconversion of any part of it during the life of the mortgagor will give no right to the heir at law, the question being not as to the state in which the surplus was found, but as to the character given it by the deed; and the *onus* being upon the heir at law to prove the reconversion.

An attempt by a settlor to redeem a mortgage on the settled property, after the date of the settlement, in a suit which did not seek to displace the trustees and to which they were not parties, so far from being inconsistent with the settlement, was held to be an act done in pursuance of the settlor's covenant to assist in executing the trusts of the deed (*y*).

(*s*) *Lloyd v. Wait*, 1 Ph. 61.

(*t*) *Tonkin v. Lethbridge*, G. Coop. 44.

(*u*) *Hawkins v. Chappel*, 1 Atk. 622.

(*x*) *Griffith v. Ricketts*, 7 Hare, 299; 14 Jur. 166; *Biggs v. Andrews*, 5 Sim. 424.

(*y*) *Griffith v. Ricketts*, *supra*.

**1256.** Where a mortgage was made of the wife's land by her and her husband, with a fine; and part of the debt, having been discharged by the husband, was again borrowed by him of the mortgagee without any fine, but with an agreement (to which the wife was a party, and which was endorsed on the mortgage), that the land should be charged with the new loan, the heir of the wife was not permitted (*z*) to redeem without payment of the whole amount due with interest and costs; the mortgagee having, in the words of Lord Nottingham, "as good a title to the land by the forfeiture, and as much equity to the money, as the heir to the land."

If there be co-heiresses of the equity of redemption, and the mortgage be devised to one of them, she may be sued by the other for the redemption of her moiety (*a*). But the heir and devisee (*b*) of the mortgagor, both claiming the equity of redemption, cannot be co-plaintiffs in a redemption suit, for there can be no decree between plaintiffs having adverse rights. If the equity passes by the will, the will must be established against the heir, who should be then a defendant, and so *vice versâ*. And this difficulty cannot be avoided by stating an agreement to divide the property, because such an agreement concerning a litigated estate is bad.

**1257.** If the mortgagor die leaving a daughter, and his wife *priviemment ensient* of a son, and the daughter pay the money at the appointed day, and afterwards the son is born; it has been held by eight judges against two (the other two being doubtful) (*c*), that the daughter shall retain the land. For which the reasons were given, that she had recovered it by her own vigilance, and was entitled to hold it as a purchaser; that if she had not paid the money, the land would have been lost; and that she had no remedy for the money, and if the son were to have the land she would lose both. But the dissentient judges said that she paid the money voluntarily, and

(*z*) Rayson v. Sacheverel, 1 Vern. 41; 2 Ch. Ca. 98.

1; but see now 15 & 16 Vict. c. 86, s. 49.

(*a*) Newling v. Abbott, 2 Eq. Ca. Abr. 596.

(*c*) Kirton's case, Cro. Car. 87; 1 Eq. Ca. Abr. 315.

(*b*) Cholmondeley v. Clinton, 4 Bligh,

at her own peril; and that she had the land as heir, and should be defeated by the birth of a nearer heir.

Mr. Powell and his editor Mr. Coventry differ in opinion upon this case (*d*); the former considering that the question depends upon the degree of pressure under which the money was paid; so that if the daughter paid it officiously, the equity would be against her, but if to save foreclosure, the birth of the son should not divest her estate, because the land would have been lost, and the maxim *qui sentit onus sentire debet et commodum* would apply; whilst Mr. Coventry thought, that the money having been paid at the day, and the redemption being therefore a legal redemption, it was right *at law*, that the daughter should hold absolutely for the reasons given by the majority of the judges; but that if it had been a case of equitable redemption to prevent foreclosure, it might have been otherwise.

The doctrine of the majority of the court seems to be in fact correct as a legal decision; for it is clear that if there had been no redemption at the day, the estate would have been irrecoverably gone at law; and the equitable doctrine of redemption was yet in its infancy, and vehemently opposed by the courts of law. But at the present day it is submitted, that the daughter would hold subject to redemption by the true heir; for, though by the legal doctrine, the estate would still be forfeited at law, yet the equitable right of redemption after forfeiture would save it, and it would *not* be lost to the heir merely by non-payment at the day. Therefore the payment by the daughter, to prevent forfeiture at law, would be officious and savouring of fraud, as being made only to get possession of the estate.

## 1258. Although a person, beneficially interested in the

(*d*) Powell, Mort. 317 a, and note (*u*), 6th ed. The qualified heir is entitled to the intermediate rents, whether received or due, and both of fee simple and entailed estates; on the principle of the feudal law—that he may discharge the services of the lands.

(Richards *v.* Richards, Joh. 754; 6 Jur., N. S. 1145.) But it seems to be otherwise as to rents not received, where trustees hold the legal estate. (Goodall *v.* Gawthorne, 2 Sm. & G. 375.)

equity of redemption of a freehold estate, may redeem if the devisees in trust refuse to do so, he cannot redeem after becoming bankrupt; nor acquire a right to redeem by taking upon himself the character of administrator *de bonis non* of the mortgagor, though the equity of redemption was devised to the trustees upon trust for the payment of debts. Such remedy as he has is against the trustees to compel the performance of the trusts (*e*).

**1259.** The equity of redemption of a mortgage of leaseholds for a subsisting term of years, or of other chattel interest, will vest in the personal representative of the mortgagor (*f*); but it is otherwise of a term created out of the inheritance for the purpose of the security (*g*), which cannot be redeemed by the legal personal representatives of the mortgagor, even for the purpose of making the property available for the intestate's debts (*h*).

**1260.** Where the administrator of a lessee for years mortgaged the term and died, it was held by Lord Nottingham, on demurrer, that as he became liable to a *devastavit*, in case enough were not left to pay the debts, the equity of redemption belonged to him in his own right, and his executor should have it that he might discharge this liability (*i*). The executor of the administrator who has mortgaged was therefore held entitled to redeem, and not the administrator *de bonis non* of the lessee. But it has since been held (*k*), that though an action on the deed could only be brought in the name of the personal representative of the administrator who made the mortgage, yet the question in equity being who is entitled to the estate, and the administrator *de bonis non* being ultimately entitled to the reconveyance if there be no claim by the representative of the administrator in respect of disbursements by him for the benefit

(*e*) *Fray v. Drew*, 11 Jur., N. S. 130.

(*f*) *Anon.*, 2 Vern. 177.

(*g*) *Bradshaw v. Outram*, 13 Ves. 234.

(*h*) *Catley v. Simpson*, 33 Beav. 551; 10 Jur., N. S. 998.

(*i*) *Butler v. Bernard*, Freem. Ch. Ca. 139; 1 Ch. Ca. 224; 3 Y. & C. 33 n, from Lord Nottingham's MS.; *Skeffington v. Whitehurst*, 3 Y. & C. 1.

(*k*) *Skeffington v. Budd*, 9 Cl. & Fin. 219; 6 Jur. 809.

of the estate, he is also the person entitled to redeem ; and that his right cannot be controverted by the administrator *de bonis non*, notwithstanding the supposed authority of Lord Nottingham to the contrary. In the ordinary case of redemption by an administrator, if he die before the enrolment of the decree, his title being gone, the decree shall not be enrolled for the benefit of his administrator (*l*).

But if one executor mortgage the testator's estate ostensibly for executorship purposes, and die, the surviving executor may sue for redemption ; though, if he be also the representative of the executor who mortgaged, he cannot file a bill to impeach the mortgage, or, in the alternative, to redeem, because he cannot impeach a deed executed by the person whom he represents ; and having the mixed character of a person who cannot sue, and of the representative of one who could have done so, he cannot sever those characters, and sue as if he had filled one of them only (*m*).

**1261.** The executor of one outlawed may redeem the outlaw's mortgaged leasehold, which had become forfeited, after reversal of the outlawry (*n*).

**1262.** Personal representatives cannot, as a general rule, sue *in formâ pauperis* (*o*) ; and an executor who had obtained an order to sue in that manner for redemption was dispaupered (*p*). But this, according to the report, was not done on the authority of the general rule, but on the ground that a plaintiff who offers to redeem must have the means of doing so ; an argument which is not just, because then no plaintiff could sue for redemption *in formâ pauperis*, the contrary of which is shown by practice if not by direct authority (*q*) ; and not conclusive, because it may be that a person will be found to take a transfer of the security before the day fixed for redemption arrives.

(*l*) Warren v. —, 2 Ch. Ca. 248,  
cit. 1 Eq. Ca. Abr. 163.

(*m*) Miles v. Durnford, 2 Sim., N. S.  
234; 2 De G., M. & G. 641.

(*n*) Peyton v. Aycliffe, 2 Vern. 312.

(*o*) Dan. Ch. Pr. 38, ed. 4.

(*p*) Fowler v. Davies, 16 Sim. 182.

(*q*) Batchelor v. Middleton, 6 Hare,  
86.

**1263.** It is said (*r*) that the right to redeem goods which have been pledged is only personal where no time has been fixed for payment, and consequently that, though the pledgor, so long as he is not called upon to redeem, may do so at any time during his life, his representatives cannot redeem after his death. According to Story (*s*), there are cases in equity in which the right has been enforced in favour of representatives. But the English cases which he cites do not support the assertion. In two (*t*), the question of the executor's right was not raised; and the report of Mr. Vernon (who took part in the discussion) and the registrar's book (*u*) both show that in the first the pledgor himself was the original plaintiff, and that a time was fixed for redemption. In the second (*x*), although the chattels were at first pledged, it seems that a mortgage was afterwards created. A third authority states the point as doubtful (*y*).

It is, however, agreed that the pledgor's executor may redeem, if a day were fixed for the redemption (*z*).

*The Rights of Members of Benefit Building Societies.*

**1264.** The rights upon redemption by members of benefit building societies, to whom advances have been made by their society on mortgage security, are somewhat different from the rights of ordinary mortgagors. The statute (*a*) which regulates such societies, enables them to raise, by the subscriptions of their members, [in] shares not exceeding the value of 150*l.* each (such subscriptions being limited to 20*s.* per month for each share), a stock or fund to enable each member to receive, out of the funds, the amount or value of his or her shares for the purpose of acquiring real or leasehold estates, to be secured by mortgage to the society until the amount or value of the shares advanced has been fully

(*r*) Ratcliff *v.* Davis, Yelv. 178;  
1 Bulst. 29.

(*s*) Bailments, § 348; Eq. Jur.  
§ 1032.

(*t*) Demainbray *v.* Metcalf, 2 Vern.  
691, 698; Pre. Ch. 420; Vanderzee *v.*  
Willis, 3 Bro. C. C. 21.

(*u*) Reg. Lib. A. 1715, 108.

(*x*) Vanderzee *v.* Willis, *supra*.

(*y*) Com. Dig. 5, 149; citing Croke's  
Rep. of Ratcliff *v.* Davis, in which the  
judges differed on the point. See S. C.  
1 Bulst. 29.

(*z*) 1 Bulst. 29, per Croke, J.

(*a*) 6 & 7 Will. 4, c. 32, s. 1.

repaid to the society with interest, and all fines or other payments in respect thereof. And no members are entitled to receive, from the funds of the society, any interest or dividend by way of annual or periodical profit upon any shares in the society, till the amount or value of his or her share shall have been realized; except on the withdrawal of such member according to the rules of the society.

In a case (*b*) of an advance made to a member of a building society under regulations by which advances could be made to none but a member, and by which the advance was made in the form of a payment of the present value of his share, and the mortgage deed expressed the intention to be to secure the regular payment of the subscriptions, redemption fee, and other monies which should become payable by the mortgagor in respect of his shares; and the trust was to permit him to enjoy the property upon making such payments; but upon default, in case the income should be insufficient for those purposes, to sell and apply the proceeds in making such payments, with a declaration that in case of sale all monies, which should afterwards become due in respect of the shares, should be considered as due at the time of sale, and be paid out of the proceeds accordingly: it was held, that the advance was not a mere loan to a stranger, out of the society's funds, but a loan of the then present value of the mortgagor's interest in his shares, to which if he had been in the position of a non-advanced member, he would not have been entitled till the shares were paid over at the dissolution of the society: and that no change had taken place in his liability to make the monthly and other payments which formed the price of his shares, until the arrival of that period. So that he could only redeem on the terms of paying up the amount of all these future subscriptions. And that the provision, that all monies which should become due in respect of the shares after a sale, should be considered due at the time of sale, applied to the case of redemption, and the accounts must be taken on the

(*b*) *Mosley v. Baker*, 6 Hare, 87; 1 De G., M. & G. 783; 16 Jur. 1099; 3 De G., M. & G. 1032; and see *Seagrave v. Pope*, as reversed on appeal, see Set. Dec. 483, ed. 3.



footing that all future payments to the time of dissolution were already due, and not by taking the present value of such future payments.

**1265.** The terms of limiting the liability of the mortgagor to the payments he would have to make during the probable duration of the society, are only proper where, as in the case of *Mosley v. Baker*, the deed provides that the payments in case of sale (or redemption) are to be calculated according to the probable duration of the society, and there is an exercise of the power of sale. If there be no exercise of the power, or provision for calculating the probable duration of the society if it be exercised, the direction will be to ascertain the longest period during which the society may *possibly* last, from the time when the notice is given to redeem; having regard to its net assets, and to the amount of monthly subscriptions and redemption money then continuing payable, and to the number of shares to be provided for. And it will be declared that the mortgagor shall be charged with all subscriptions and redemption money, which will become due and payable by him, assuming the society to endure for the whole of that period, such money to be treated as a debt presently due from him (*c*).

And though it will be proper to make no allowance to the mortgagor in respect of profits, where the redemption takes place at a period at which a withdrawing member could have obtained, by the society's rules, no right to profits; yet if there be a provision giving profits to a redeeming member, irrespective of any fixed period from the commencement of the society, or from his becoming a member thereof; or, if according to the rules, he have become entitled on redemption to bonuses or profits on his shares, the redeeming mortgagor will be entitled to credit for the same amount of bonus as had been paid to withdrawing members at the time when notice was given of redemption (*d*): and this, although the amount

(*c*) *Fleming v. Self*, 3 De G., M. & G. 997; *Kay*, 518; 19 Jur. 25; 24 L. J., N. S., Ch. 29.

(*d*) *Fleming v. Self*, sup., including redemption monies paid in by the mortgagor. (*Smith v. Pilkington*, 1 De G.,

was in fact a greater sum than the society's funds could bear (*e*).

**1266.** If the rules of a benefit building society expressly provide that an advanced member may redeem, on payment of his subscription to a certain period, being the period calculated for the duration of the society, the member may redeem at that period, though the failure of the funds to meet the amount of the share proposed to be realized for each member makes it necessary to continue the society for a longer period; and the society is not entitled to retain the deeds as a security for the subscriptions to become due from the redeeming member during the continued period (*f*). And redemption will be granted upon the terms of the contract construed by the rules in force at its date, and not according to subsequent rules which require increased payments, although the member covenanted to pay the monies in respect of his share prescribed by, and to observe the rules of the society for the time being (*g*).

**1267.** A provision in a building society's mortgage that the trustees should retain out of the proceeds of sale under the power all subscriptions, fines and other monies which should be then due or should become due in respect of the advanced shares during the remainder of the period over which the repayment of the principal and interest was spread, gives trustees a right to all subscriptions and fines payable to the completion of the sale, and to the then remaining unpaid principal, but not to interest after repayment of the principal—because interest is only due in respect of forbearance (*h*).

F. & J. 120; 4 Jur., N. S. 58; 29 L. J., N. S., Ch. 227; and see *Archer v. Harrison*, 7 De G., M. & G. 404; 3 Jur., N. S. 194.)

(*e*) *Fleming v. Self*, sup.; and see the original decree by Sir W. P. Wood, V.-C., Kay, 518.

(*f*) *Sparrow v. Farmer*, 26 Beav. 511; 5 Jur., N. S. 530; *Handley v.*

*Farmer*, 29 Beav. 362. As to the effect of the rule on the continuance of the society, see *Farmer v. Smith*, 4 H. & N. 196; 5 Jur., N. S. 533, n.

(*g*) *Norwich and Norfolk Provident Society, Re*, *Smith's case*, L. R., 1 Ch. Div. 481.

(*h*) *Osborne, Exp.*, L. R., 10 Ch. 41.

**1268.** In a suit concerning a mortgage to a building society, the society, insisting that the mortgagor shall only redeem subject to his liabilities as a shareholder, must show plainly that he is a member of the society, of which fact the society's book containing the mortgagor's name is primary evidence, where the rules of the society direct that the name of each member be inserted in a book (*i*).

If the mortgagor rest his case upon the terms of the mortgage deed, not seeking to have it reformed, he cannot object that the terms of the deed depart from the rules of the society (*j*).

**1269.** A building society, under the act of Will. 4, may advance money to strangers as well as to its own members, but it seems to be usual that persons taking advances shall become members (*k*). It has, however, been said to be a fraud on the statute (which was meant to enable industrious persons to lay out small sums in the purchase of land, or the purchase or erection of buildings), for a joint stock company, established for a different purpose, to borrow money, and for that purpose to affect to become members of these societies. And it has been held (*l*), that such companies cannot hold shares in them, and that if a building society lend money to a company, the latter may redeem on the usual terms of redemption, and without respect to the liabilities of shareholders.

**1270.** The form of the award provided in the schedule of the act 10 Geo. 4, c. 56 (the provisions in which, for arbitration of disputes between friendly societies and their members (*m*), are incorporated in the act 6 & 7 Will. 4, c. 32 (*n*)), and the language of the act itself, which provides no means of working out decrees for redemption or delivery of deeds, or consequential directions, and does not go beyond mere questions of expulsion

(*i*) *Dobinson v. Hawks*, 16 Sim. 407.

(*j*) *Mosley v. Baker*, 3 De G., M. & G. 1032.

(*k*) *Cutbill v. Kingdom*, 1 Exch. 494.

(*l*) *Dobinson v. Hawks*, 16 Sim. 407.

(*m*) Sect. 27.

(*n*) Sect. 4.

or payments of money, leave untouched the jurisdiction of the courts on matters concerning the redemption of mortgages or breaches of covenant in the mortgage deed; or to which the form of award is otherwise inapplicable (*o*).

**1271.** A suit for the redemption of property mortgaged by a member of a building society, on payment of what shall be found due from him, will be treated as a suit for settling the rights of the parties, and the plaintiff may be ordered to pay a sum found due from him to the society, though it be in excess of the amount secured by the mortgage (*p*). A member of a building society is liable on the covenant in his mortgage to pay subscriptions, though he ceased to be a member before the subscriptions fell due (*q*), and he cannot redeem without paying fines which are properly due from him (*r*).

Though the rules of a society allow discount on the redemption of mortgages before the time fixed, it will not be allowable where the property is sold under the mortgage, if the rules do not specially authorize its allowance under such circumstances (*s*).

### *Of the Payment or Satisfaction of the Debt.*

**1272.** After default, the mortgagee is generally entitled to notice before his security is discharged by payment; the reason of which is said to be that the mortgagor having lost his estate at law, and being only entitled to redeem in equity, must do equity by allowing a reasonable opportunity for the mortgagee to find a new security for his money; for which six months

(*o*) *Fleming v. Self*, Kay, 518; 3 De G., M. & G. 997; 1 Jur., N. S. 25; *Morrison v. Glover*, 4 Exch. 430; Reg. v. Trafford, 4 El. & Bl. 122; 1 Jur., N. S. 252. As to the effect of the arbitration clause on the right to sue for subscriptions, see *Farmer v. Giles*, 8 W. R. 649.

(*p*) *Handley v. Farmer*, 29 Beav. 362.

(*q*) *Farmer v. Giles*, 8 W. R. 649.

(*r*) *Parker v. Butcher*, L. R., 3 Eq. 762.

(*s*) *Matterson v. Elderfield*, L. R., 4 Ch. 207.

is treated as the proper time. And by a rule of practice the mortgagee is entitled to six months' interest in lieu of notice (*a*). At law three months' interest in advance formed part of a sum overpaid to prevent a sale by the mortgagee, and which the mortgagor was allowed to recover as a payment under compulsion (*b*).

There appears to be no direct authority as to the extent of these rules. It may be assumed, from the reason which is given for them, that they apply not only to securities upon real estate, but upon choses in action and other personalty wherever the nature of the security might make it necessary for the mortgagor to come to a court of equity for redemption. But in the case of a mere pledge of chattels, where only a special property passes to the pledgee, and the pledge may be redeemed at any time during the life of the pledgor, and is revested in him by mere tender of the debt (80), it may be that the rules will not apply. They also seem to be inapplicable where the security is naturally discharged by an event which does not depend upon the will of the debtor, as by the falling in of a policy of insurance, which constitutes the security; for it may be considered as part of the arrangement that the debt, if not sooner discharged, shall be paid upon the happening of that event.

**1273.** But if the mortgagee demand his money or take proceedings to realize his security, which amounts to a demand, notice will be unnecessary (*c*) (1597). And a mortgagee who has come in and proved his debt in a cause, is bound to take his money without notice, and to join in the conveyance (*d*). Upon the expiration of the notice, the mortgagee is bound to know the amount due to him, and if he refuse to accept an uncon-

(*a*) 2 Ca. & Op. 51. Per Shadwell, V.-C. E., in *Browne v. Lockhart*, 10 Sim. 424. And it has been laid down that, in case of default in payment after notice, whether it were given by the mortgagor or mortgagee, six months' further notice or interest is

necessary. (Per Malins, V.-C., *Bartlett v. Franklin*, 15 W. R. 1077.)

(*b*) *Close v. Phipps*, 7 M. & S. 586; 8 Sc. N. R. 381.

(*c*) 2 Ca. & Op. 51; *Letts v. Hutchins*, L. R., 13 Eq. 176.

(*d*) *Matson v. Swift*, 5 Jur. 645.

ditional tender of all that is due, it will be at his own peril (*d*). If he extort more than is due, the over-payment may be recovered by the mortgagor as money received by the mortgagee to his use (*e*). But the mortgagee may be justified in a qualified refusal of a tender of the proper sum, made at the appointed time; as if with the money the mortgagor tender him for his execution a deed of assignment containing covenants by the mortgagee; because the mortgagee is entitled to a reasonable time to be advised, whether such a deed be proper for him to execute, and a draft should have been sent him beforehand; for which purpose a week was thought by Lord Hardwicke to be a reasonable time (*f*).

**1274.** The condition is well performed by a payment accepted by the creditor, though it were made before the day fixed by the condition (*g*) (1285).

**1275.** If upon tender of the sum due under a mortgage the mortgagee refuse the tender, the mortgagor may re-enter and the land is freed from the condition; but the debt remains and may be recovered by action where the sum to be paid was a debt: if it were only a gratuitous payment there is no remedy (*h*).

So a lien is discharged by tender of the debt (*i*).

**1276.** The conduct of the creditor may, however, amount to a dispensation with the tender. This will not be the consequence of a mere claim of more than is due; but if claiming too much, or setting up two different claims, one of which is wrongful, he so conducts himself as to show that a tender of the amount properly due would not be accepted, it will be a dispensa-

(*d*) *Sharpnell v. Blake*, 2 Eq. Ca. Abr. 604; *Harmer v. Priestley*, 16 Beav. 569; 22 L. J., N. S., Ch. 1041.

(*e*) *Close v. Phipps*, 7 M. & G. 586; 8 Sc. N. R. 381; *Fraser v. Pendlebury*, 10 W. R. 104.

(*f*) *Wiltshire v. Smith*, 3 Atk. 89; 9 Mod. 441.

(*g*) *Burgayne v. Spurling*, Cro. Car. 283.

(*h*) Co. Litt. 209 b.

(*i*) *Martindale v. Smith*, 1 Q. B. 389; 1 G. & D. 1.

tion (*h*). A claim for a lien in excess of the sum which is strictly due will not exonerate from the tender; because if the claimant had been shown the lesser amount he might possibly have accepted it (*l*).

**1277.** The debt must be tendered at a proper time and place, in sufficient money, with proper formalities, and by and to the proper person.

To save the condition at law, the money might be tendered at any time on the day fixed, at the appointed place; and if it were tendered at any time of the day, and refused, it need not be tendered again before the last instant of the day (*m*).

If a certain hour be fixed for payment of the mortgage money, an attendance before the beginning of the next hour will be sufficient; because an hour is considered, for this purpose, as a twenty-fourth aliquot part of a day. Therefore where (*n*) the hour fixed was three o'clock, and the mortgagee waited from a quarter before till a quarter after that hour, and the mortgagor attended before four o'clock, he was excused from payment of any interest, after that day. And to satisfy an order to pay money, between certain specified hours, it is not necessary to attend during all the interval between those hours. Thus, where the order was to pay between eleven and twelve o'clock, the mortgagee's attendance for an hour, from twenty minutes after eleven, was held (*o*) to be sufficient to support the order absolute; the mortgagor not having appeared during all that time. But attendance at the end of the hour, or of the interval between several hours, is presumed to be necessary.

**1278.** The feoffor needeth not, says Littleton (*p*), speaking of the strict performance of the condition, to seek the feoffee in

(*h*) Scarfe v. Morgan, 4 M. & W. 270; Kerford v. Mondel, 28 L. J., Ex. 303; Norway, B. & L. 409. See Jones v. Tarleton, 9 M. & W. 675.

(*l*) Allen v. Smith, 12 C. B., N. S. 638, per Willes, J.; Ashmole v. Wainwright, 2 Q. B. 837; 6 Jur. 279.

(*m*) Wade's case, 5 Rep. 115 b.

(*n*) Knox v. Simmonds, 4 Bro. C. C. 433.

(*o*) Anon., 1 Coll. 273; Bernard v. Norton, 10 L. T., N. S. 183.

(*p*) Sect. 342.

another place, nor to be in any other place, but in the place comprised in the indenture, nor to be there longer than the time specified in the same indenture, to tender or pay the money to the feoffee.

The place of payment mentioned in the mortgage deed relates in strictness to the time of payment there mentioned (*g*); and unless a particular place be agreed upon, a personal tender is generally necessary. Yet if the place of payment mentioned in the deed be an usual one for the payment of mortgages, and there be no circumstances which make the choice of it unreasonable, the mortgagor's notice fixing upon that place for payment will be good. So, if the place chosen be an usual place, and not unreasonable with regard to the circumstances of the case, the tender may be made (*r*) there in pursuance of notice, though the place be not named in the deed, if the mortgagee take no objection to the notice; as where notice was given of payment at Lincoln's Inn Hall, the money having been lent in town, though the mortgagee lived at Oxford.

And it may even be sufficient to tender the money at the mortgagee's house, or last place of abode, though it do not appear that the tender was made to him, or even that he was within the house; but this it is presumed can be only done under particular circumstances, as where the mortgagee is deliberately keeping out of the way to avoid the tender; or, as it happened in a case, where there was evidence that the mortgagee had expressed a determination to hold the property as long as he could, and after that to transfer it to a particular friend of his own (*s*).

In the case of money charged on land, the place of contract, and of the residence of the parties, will be the place for payment, the charge being a sum in gross, and not a rent issuing out of the land (*t*). But the tenor of the whole instrument will be considered, and where the deed actually fixed Lincoln's Inn Hall as the place for payment of money charged on land in Ireland, the House of Lords disregarded the reservation, and

(*g*) *Sharpnell v. Blake*, 2 Eq. Ca. Abr. 604.

(*r*) *Gyles v. Hall*, 2 P. Wms. 378.

(*s*) *Manning v. Burges*, 1 Ch. Ca. 29.

(*t*) 5 Vin. Abr. 209.



held that the owner of the money was not entitled to have it sent to England free of charges and exchange (*u*).

' **1279.** In England (*x*), but not in Scotland (*y*), or Ireland (*z*), notes of the governor and company of the Bank of England, expressed to be payable to the bearer on demand, are a legal tender to the amount expressed therein, for all sums above five pounds, so long as the bank shall continue to pay the said notes on demand in legal coin; except by the company, or any branch bank of theirs.

Before Bank of England notes were thus made a legal tender, the mortgagee might object to a tender made in such a form; and the same rule applied, and still holds good, subject to the first of the acts above mentioned, and as to country, and other bank notes, and bills and other securities or notes for money. But a tender of notes or bills may, it seems, be made good (*a*) by an offer forthwith to turn them into money; and the objection, if any be taken, must be to the quality of the tender: for if the refusal be merely on the ground of insufficiency in quantity, or otherwise, it will be taken that the tender was well made as to its quality (*b*).

In like manner if the mortgagor tender a larger sum than is due, and ask for change, or desire the creditor to take thereout what is due, the tender will be good, if a larger sum be demanded, or no objection be made to the non-tender of the exact sum (*c*). And it is said to be even too late to object to the tender as such, if after acceptance thereof, some of the money prove to be counterfeit (*d*) (**1379**).

It was considered (*e*) by Lord Alvanley, in Ireland, that where from the circumstances of the country, the law had put it out of the power of a person to get a large sum of money in

(*u*) *Lansdowne v. Lansdowne*, 2 Bligh, 60. See Colquh. § 1827—§ 1834.

(*x*) 8 & 4 Will. 4, c. 98, s. 6.

(*y*) 8 & 9 Vict. c. 38, s. 15.

(*z*) 8 & 9 Vict. c. 37, s. 6.

(*a*) *Austen v. Executors of Dodwell*, 1 Eq. Ca. Abr. 318.

(*b*) *Lockyer v. Jones*, Peake, 180, n.; 2 Cr. & Jer. 16, n.; *Tiley v. Cour-*

*tier*, id. 16, n.; *Polglass v. Oliver*, id. 15; *Biddulph v. St. John*, 2 Sch. & Lef. 521. See Colquh. R. C. L. § 1825.

(*c*) *Black v. Smith*, Peake, 88; *Biddulph v. St. John*, supra.

(*d*) Bac. Ab. "Tender," B.

(*e*) *Biddulph v. St. John*, supra.

specie, the court would take notice of the fact, that it might give effect in equity to a tender not pleadable at law.

**1280.** Generally the money should be actually produced, and this rule was somewhat strictly enforced at law; for it is said, that though the creditor may at first refuse, yet the sight of the money may tempt him to take it (*f*).

A tender by letter will not suffice in equity more than at law, even though the answer refer to it as a tender (*g*).

But both at law and in equity it was held, that actual production may be dispensed with by the express declaration or equivalent act of the creditor, if the tender be otherwise sufficient (*h*).

As for instance, if the debtor say he has the sum ready in his pocket (stating the amount), and has brought it for the purpose of satisfying the demand; or being in the house, offer to go and fetch it from another part of the house, but the creditor desire him not to trouble himself to produce or to fetch the money, as he will not take it (*i*); or, if the creditor, not communicating personally with the debtor, refuse to authorize his agent to take the money, or to take it himself; the tender will be good (*h*).

But not, it seems, if the offer be to fetch the money from a distance (*l*); or if the production of the money be only prevented by the departure of the creditor before the debtor can take it from his pocket (*m*); though the distinction between such an act of the creditor, where the debtor is plainly about to produce the money, and a verbal expression of intention not to take it, is but narrow. And where, referring to a former conversation, the debtor said, "I will pay you the money I offered you yesterday," but it did not appear where

(*f*) *Dickinson v. Shee*, 4 Esp. 67; *Thomas v. Evans*, 10 East, 101; *Douglas v. Patrick*, 3 T. R. 683.

(*g*) *Powney v. Blomberg*, 8 Jur. 746.

(*h*) *Thomas v. Evans*, Danks, Exp., 2 De G., M. & G. 936; *Dickinson v. Shee*, 4 Esp. 67.

(*i*) *Douglas v. Patrick*, 3 T. R. 683; *Harding v. Davies*, 2 Car. & P. 77.

(*h*) *Robarts v. Jefferys*, 8 L. J. (Ch.) 187.

(*l*) *Harding v. Davies*, 2 Car. & P. 77.

(*m*) *Leatherdale v. Sweepstone*, 3 Car. & P. 342; and see *Finch v. Brook*, 1 Bing. N. C. 253.

the money was, or whether it could be immediately got at, the tender was held bad (*n*). And it is not sufficient for an agent of the debtor to say, that the money has been left with him for payment of the debt, if he do not offer it (*o*).

A good tender may be made of money contained in bags, if it be proved, that the money was really contained in them (*p*); for that is the usual way to carry money, and it is the mortgagee's business to count it. In another old case, however, it was held, that where the mortgagor, at the day and place appointed, said to the mortgagee, "Here I am ready to pay you," naming the sum, which was of due money, and yet held it all the time upon his arm in bags, this was no good tender (*q*); the reason whereof, viz. that it might be counters or base coin for anything that appeared, seems to conflict with the case in Coke; but not the decision apart from the reason, for it is not said that the bags were offered.

And a tender has been upheld, where the person who made it had twisted up part of the money in the notes which formed the rest, and told the creditor of what the parcel consisted, though he did not open it before him. But it would have been otherwise if he had not told him (*r*).

**1281.** A tender will be bad if it be clogged with a condition—as that the payment shall be taken (*s*), as a balance due; or demand be made of a receipt in full, where the other party offers to take the money in part payment (*t*); or, generally, where such a demand is made; unless the creditor, making no objection on account of the condition, refuse the tender on another ground, as that the amount is insufficient (*u*).

**1282.** A good tender cannot be made by a stranger (**564**, **1251**), or, generally, by any not entitled to the equity of redemption; for, as against all but such persons, the estate is the property of the mortgagee (*x*) (**1168**); but as by the civil

(*n*) *Glasscott v. Day*, 5 Esp. 48.

(*o*) *Thomas v. Evans*, 10 East, 101.

(*p*) *Wade's case*, 5 Rep. 115 a.

(*q*) *Suckling v. Conely, Noy*, R. 74.

(*r*) *Alexander v. Brown*, 1 Car. &

P. 288.

(*s*) *Evans v. Judkins*, 4 Camp. 156.

(*t*) *Glasscott v. Day*, 5 Esp. 48.

(*u*) *Cole v. Blake, Peake*, 179.

(*x*) *Litt. s.* 334; *Watkins v. Ash-*

law (*y*) a guardian may pay for his ward (1234); or an attorney, manager or agent for his principal (*z*). The persons entitled to redeem are of course able to make a good tender of the mortgage-money (1208).

It has been laid down by Lord Coke (*a*), that if an heir be an idiot, of what age soever, any man may make the tender for him on the ground of charity, on account of his absolute disability. A tender to save forfeiture at law is here referred to, and not a tender to effect redemption in equity.

Where a tender of the whole sum due is made by an agent, who is authorized to tender only part of the money, it will yet be good though he tender the residue at his own risk (*b*).

**1283.** The tender, to be a good legal performance of the condition, must be made to the persons named in the condition (*c*). In equity it may, be made to the person or persons legally entitled to receive the money, and to re-convey the estate; and where legal and beneficial titles are united in one of such persons, he has no right to insist upon payment in his character of beneficial owner. Thus, where the persons entitled were devisees and executors, and one of them being beneficially interested in the mortgage-money, refused to complete the discharge and recoveyance, unless the interest were paid to himself, on his separate receipt, acknowledging at the same time the sufficiency of the whole tender, his demand was held to be wrong, and interest ceased to run from the date of the tender (*d*).

The money will be well tendered to the executors of the mortgagee, though the day fixed fall before they have proved the will (*e*).

*wicke*, Cro. Eliz. 132; see *Owen*, 137; *Lomax v. Bird*, 1 Vern. 182; *James v. Biou*, 3 Sw. 234; and see *Flack v. Longmate*, 8 Beav. 420.

(*y*) Colquh. R. C. L. § 1821.

(*z*) And if a solicitor pay off his client's mortgage, he is considered to have paid it as his agent. (*Ward v.*

*Carttar*, 35 Beav. 171; L. R., 1 Eq. 29.)

(*a*) Co. Litt. 206 b.

(*b*) *Read v. Goldring*, 2 M. & S. 86.

(*c*) Co. Litt. 210.

(*d*) *Cliff v. Wadsworth*, 2 Y. & C. C. 598.

(*e*) *Austen v. Executors of Dodwell*, 1 Eq. Ca. Abr. 318.

1284. The mortgagor will not be discharged by payments to the agent of the mortgagee, unless—as in the case of a solicitor taking out of court the money which has been paid in to discharge the mortgage (*f*)—the agent have authority to receive the money on the mortgagee's behalf.

The rules upon this subject arose at first out of the custom of employing scriveners to lend out the money of their clients, who, if they left their securities with the scrivener, were held (*g*) to have thereby authorized him to receive the interest; and if the security were a bond, the authority to receive extended to the principal also, because the scrivener was enabled to redeliver the bond to the borrower, and thereby to extinguish the debt at law. But the possession of the securities did not alone confer upon the scrivener authority to receive the principal of a mortgage debt, because he could not revest the estate in the debtor by merely redelivering the deed (*h*); and whether the security were bond or mortgage, the scrivener could not receive the principal where the creditor had not trusted him with the possession of the security, though he might have allowed him to receive the interest (*i*); but if the creditor had confirmed or acquiesced in the receipt by the agent of any part of the principal, the payment would be allowed to the debtor (*j*).

These decisions, however, so far as they recognized the authority of the scrivener to receive the principal of a bond debt, and the interest of a bond or mortgage debt, turned upon the peculiar nature of the scrivener's employment, wherein were combined the business, now exercised by the banker, of investing, receiving and re-investing the money of his customer (who by so intrusting him submits to be bound by his

(*f*) *Bourton v. Williams*, L. R., 5 Ch. 655.

(*g*) *Whitlock v. Waltham*, 1 Salk. 157.

(*h*) *Martyn v. Kingsly*, Pre. Ch. 209. Per M. R., *Duch. Cleveland v. Dashwood's Executors*, Freem. Ch. 249.

(*i*) *Henn v. Conisby*, 1 Ch. Ca. 93; *Gerrard v. Baker*, cited there; *Degg v. Osbaston*, id. 111; *Roberts v. Matthews*, 1 Vern. 150; *Curtis v. Drought*, 1 Mol. 487; *Wolstenholm v. Davis*, Freem. Ch. 289.

(*j*) *Duch. Cleveland v. Dashwood's Executors*, *supra*.

acts (*k*)), with that of the attorney, who prepares and transacts the legal business connected with the security.

The modern authorities, therefore, do not recognize any power in the mortgagee's attorney to receive either the principal or the interest of the mortgage debt merely by virtue of his possession of the security, or to receive the principal by virtue of an authority to receive the interest; unless, perhaps, as to the interest, it be shown that he acted as a scrivener (*l*), or may be inferred that the mortgagee treated him as his agent to receive the interest; as where, after receiving interest by his hands, he allowed arrears to accumulate without applying for payment to the mortgagor (*m*) (1417).

**1285.** The payment of the principal of the mortgage debt to the general agent of the mortgagee, before the day fixed for repayment, may also be considered to be void as an attempt to rescind the contract contained in the mortgage, independently of the objection that the power of receiving the money is not incident to the character of the agent (*n*).

**1286.** Although a joint debt is discharged at law, by payment to one joint creditor (*o*) (as on the other hand the discharge of one of several joint debtors is a release at law of all of them (*p*)) (1350), the receipt of one joint creditor for a mortgage debt, without evidence of any special authority for

(*k*) See *Spaight v. Cowne*, 1 H. & M. 359, where the attorney seems to have had an authority closely resembling that of the scrivener.

(*l*) *Wilkinson v. Candlish*, 5 Exch. 91; *Simms v. Brutton*, id. 802; *Wilkinson v. Tate*, L. R., 4 Ch. 288. See *Cottam v. E. C. Railway Co.*, 6 Jur., N. S. 1367, and *Gibson's* case cited there. So, if a mortgagee place money in the hands of his solicitor for investment, and he appropriates the money to his own use, and fraudulently procures a mortgage upon the property of another client, unless the creditor can prove that he paid the money to the

solicitor, as the agent of the mortgagor, or that it was applied for his benefit, the latter will not be bound by the deed. If payment to the alleged mortgagor be in doubt, the burden of proof will be on the creditor. (*Wall v. Cockerell*, 8 W. R. 441; 10 H. L. C. 229; and see *Vandeleur v. Blagrave*, 6 Beav. 565.)

(*m*) *Kent v. Thomas*, 1 H. & N. 473.

(*n*) *Burrough v. Cranston*, 2 Ir. Eq. Rep. 203.

(*o*) *Husband v. Davis*, 10 C. B. 645.

(*p*) Per *Brian, J.*, 21 Edw. 4, 81 B. pl. 33; *Nicholson v. Revill*, 4 A. & E. 675.

him to receive it, will not discharge the security in equity (*q*); which treats the interest of the creditors as a tenancy in common. So if one of the joint creditors die, his representatives are entitled in equity to his share of the debt (*r*). It is therefore usual to insert in mortgages to trustees, or other persons whose interests are intended to survive, a provision that the receipt of the survivors or survivor shall be a good discharge for the debt; and it is considered that if such a security have been acted upon by the mortgagees, the clause would operate, although the deed were not actually executed by them.

**1287.** The bonâ fide payment to, and the receipt of, any person to whom any mortgage money shall be payable upon any express or implied trust, shall effectually discharge the person paying the same from seeing to the application, or being answerable for the mis-application or non-application thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security (*s*). And a later enactment, which omits the provision as to a contrary declaration, gives the same general effect to the receipts in writing of any trustees or trustee for money payable to them or him by reason or in the exercise of any trusts or powers vested in them or him (*t*).

But the receipt of trustees for money will not discharge the mortgagee where the security is for the retransfer of stock, unless it appears on the face of the instrument which contains the receipt that the trustees received the money for the purpose of investing it in an authorized security (*u*).

Where the person to whom the money is payable under a decree is a trustee, who appears on the proceedings to have been guilty of breaches of trust, and the court is satisfied that he is an improper person to receive the money, he will be restrained from doing so, and another person will be appointed.

(*q*) *Matson v. Dennis*, 10 Jur., N. S. 460.

(*r*) *Petty v. Styward*, 1 Rep. in Ch. 57; *Vickers v. Cowell*, 1 Beav. 529.

(*s*) 22 & 23 Vict. c. 35, s. 23.

(*t*) 23 & 24 Vict. c. 145, s. 23.

(*u*) *Pell v. De Winton*, 2 De G. & J. 13.

The solicitor of the *cestuis que trust* may be appointed, and, being an officer of the court, may be appointed without giving security, upon his undertaking to pay the money into court (*v*).

**1288.** Where the debtor claims to be discharged by reason of payments which were not specially made in respect either of the principal or the interest of the mortgage, the rule is that a general payment shall be applied in the first place to sink the interest, before any part of the principal is discharged (*w*).

It is, however, the right of the debtor, in the first instance, to declare upon what account he pays the money (*x*); according to the maxim *quicquid solvitur, solvitur secundum modum solventis*; and when he has so declared, the destination of the payment cannot be changed (*y*).

But where the debtor omits at the time of payment, to declare upon what account the money was paid, he cannot afterwards do so (*z*). The right of appropriation is then with the creditor (*a*), who may refer it to that one for which he has the least available security (*b*); and it has been held, that entries made by the debtor in his own books are not sufficient evidence of the particular application of money paid on a general account (*c*). A direction to the agent of a vendor to apply in payment of the purchase-money, a sum in his hands belonging to the purchaser, has also been held not to discharge the vendor's lien, where he was not informed of the mode of payment; although the agent had acted upon the direction, by

(*v*) *Snare v. Baker*, 13 Jur. 203.

(*w*) *Chase v. Box*, Freem. Ch. 261.

(*x*) *Mills v. Fowkes*, 5 Bing. N. C. 455; per Shadwell, V.-C. E., *Bradley v. Heath*, 3 Sim. 359. So by the civil law, Colquh. § 1836; *Bamundoss Mookerjee v. Omeish Chunder Race*, 6 Mo. E. I. 289.

(*y*) Per Lord Kenyon, *Hammersley v. Knowlys*, 2 Esp. 666; per Best, J., *Simson v. Ingham*, 2 B. & C. 65.

(*z*) Per Lord Hardwicke, *Wilkinson*

*v. Sterne*, 9 Mod. 427. Lord Kenyon, in *Hammersley v. Knowlys*, intimated that the debtor might make the appropriation at a future time in respect of a foregone transaction; but the observation appears to refer to the particular case, and not to affect the general rule.

(*a*) *Mills v. Fowkes*, 5 Bing. N. C. 455.

(*b*) *Mackenzie v. Gordon*, 6 Cl. & F. 892, per Lord Cottenham.

(*c*) *Manning v. Westerman*, 2 Vern. 606.



debiting the account of the purchaser, and crediting that of the vendor with the amount (*d*).

**1289.** On the other hand, although under the civil law the application of the payment was regulated by the law, unless the creditor made an immediate appropriation (*e*), he may, by the law of England, declare upon what account he receives the money, at any time after payment, and before action brought, or account settled between him and his debtor; and his written memorandum may be used after his death as evidence of his intention, and has been allowed to prevail against the oath of the debtor that he paid the money upon another account (*f*).

When the debtor becomes bankrupt, the creditor's right of appropriation accrues to him and is fixed at the bankruptcy and must be regulated by the state of the account at that time (*g*).

**1290.** When there has been no appropriation by either party, the general presumption, (liable to be rebutted by evidence of a different intention (*h*),) is, that the monies were intended to be applied in discharge of the items of the debt consecutively (*i*); and, therefore, where partners made a mortgage to their bankers to secure a running account, and, after the death of one of the partners, it was arranged that the account should go on with the new firm, which was then formed, and which afterwards became bankrupt, the debt which existed at the death of the partner was held to have been discharged by reason that a larger sum than was then due had been paid by the new firm before the bankruptcy (*k*). So the lien of the vendor for his unpaid purchase-money will be discharged by

(*d*) *Wront v. Dawes*, 25 Beav. 369; 4 Jur., N. S. 397.

(*e*) Per Sir W. Grant, *Clayton's case*, 1 Mer. 572; Colquh. § 1836.

(*f*) *Wilkinson v. Sterne*, 9 Mod. 427; *Simson v. Ingham*, 2 B. & C. 65.

(*g*) Per Lord Cranworth, *Johnson, Exp.*, 3 De G., M. & G. 236.

(*h*) *City Discount Co. v. McLean*, L. R., 9 C. P. 692.

(*i*) *Mills v. Fowkes*, 5 Bing. N. C. 455; *Clayton's case*, 1 Mer. 572; *Bodenham v. Purchas*, 2 B. & Ald. 39.

(*k*) *Fearenside v. Derham*, 13 L. J., N. S., Ch. 354, and see *De Medewe's Trust, Re*, 26 Beav. 588; 5 Jur., N. S. 421.

payments made by the purchaser on a general account, and which, being applied according to priority of receipts, would be sufficient to cover the debt (*l*).

In this respect also the rule of the English courts differs from that of the civil law, under which the payment was first applied in discharge of the most burthensome debt; of that which carried interest rather than of that which carried none; of that which was secured by a penalty rather than of that which rested on simple agreement; and, where all were equally burthensome, of the oldest debt (*m*). And this seems to have been formerly the rule in England; for it was laid down in an early case, that if mortgage debts, and also debts which do not bear interest, be owing by the same person, and he make a general payment, it shall be taken to have been paid towards discharge of the mortgage debt; because it is natural to suppose that he would rather elect to pay first the interest-bearing debt (*n*).

**1291.** The application of payments in discharge of the items of the account in order of date prevails against the creditor, where he attempts, post litem motam, to make an appropriation of general payments (*o*); and a solicitor, claiming costs in respect of transactions which he knew were beyond the powers of his clients, being trustees, cannot, post litem motam, appropriate general payments to costs incurred in respect of the unauthorized business. Such payments will be applied in discharge of costs which the clients were properly liable to pay (*p*). It seems, also, that even if the costs had been expressly paid to the solicitor, he could not have retained

(*l*) *Stuart v. Ferguson, Hayes, Ir.* Eq. R. 452.

(*m*) *Clayton's case*, 1 Mer. 572; *Stoveld v. Eade*, 12 Mo. 370. According to a more precise but not very intelligible statement: 1st, to extinguish interest; 2nd, capital; 3rd, debts which the debtor owes on his own account; 4th, the older debt; 5th, that which weighs most heavily on the debtor (*Colquh. § 1836.*) In Scotland, if there be no appropriation by the

debtor, the creditor by his receipt may appropriate. If no appropriation by either, the creditor may appropriate to which debt he pleases, or to interest only. (1 Bell, Com. (*Shaw*), 73. See also *Campbell v. Dent*, 2 Mo. P. C. 292.)

(*n*) *Heyward v. Lomax*, 1 Vern. 24.

(*o*) *Tardrew v. Howell*, cited 1 H. & M. 440. See 31 L. J., N. S., Ch. 57.

(*p*) *Phoenix Life Assurance Co., Re*, 1 H. & M. 433.

them as against the cestuis que trust of the clients; and it follows that, even before suit, general payments could not have been appropriated as against them to such costs.

**1292.** Where a payment is made in respect of a composition for several debts due to the same creditor, it will be applied rateably towards the discharge of all the debts, whether secured or unsecured, although, by failure of the subsequent payments, the creditor was remitted to his original rights (*q*).



## CHAPTER IX. PART 2.—OF THE RELEASE OF THE DEBT OR SECURITY.

**1293.** A security created by deed ought generally to be discharged by deed; a record by record; or a writing by writing (*r*).

By a release of all debts without more words are discharged and released all debts then owing from the releasee to the releasor upon specialties or otherwise, and upon statutes; and by releasing the debt the security for the debt is released (*s*).

An alleged release or forgiveness of the debt or of the interest of it cannot be established in equity merely by showing that the creditor had expressed an intention to release the debt, if there be nothing which amounted to a release at law (*t*).

And although it was held by Lord Hardwicke, that the mortgage could not be enforced in a case (*u*) in which the mortgagor, having brought his writings to the mortgagee, the latter said, "Take back your writings, I freely forgive you the debt;" with other expressions showing an intention to

(*q*) *Thompson v. Hudson*, L. R., 6 Ch. 320.

(*r*) Per Sir W. Alexander, *Cupit v. Jackson*, 13 Pr. 721; *McClellan*. 503. So, by the civil law, "Nihil tam naturale est, quam eo genere quidque dissolvere quo colligatum est." (Dig. 50, 17, 35.)

(*s*) *Shep. Touchst. Preston*, 342;

*Cowper v. Green*, 7 M. & W. 633.

(*t*) *Asten v. Pye*, 5 Ves. 350, n.; *Byrn v. Godfrey*, 4 Ves. 6; *Eden v. Smyth*, 5 Ves. 341; *Reeves v. Brymer*, 6 Ves. 516; *Flower v. Marten*, 2 M. & C. 459; *Peace v. Hains*, 11 Hare, 151.

(*u*) *Richards v. Symes*, 2 Eq. Ca. Abr. 617; *Barn. Ch.* 90.

benefit the mortgagor; it is considered (*x*) that he treated this not as a mere declaration of intention, but as a legal discharge, equivalent to a re-delivery of the mortgage deed. And if the mortgagee cancel the mortgage, it is as much a release as cancelling a bond, provided it be done with intention to release; but the question of intention is for a jury (*y*).

**1294.** But although no release be created at law, the creditor may have so acted that he will not be allowed in equity to enforce his security; as if, on the faith of the creditor's representation, the debtor have done acts by which his position has been altered. This may be illustrated by a case (*z*) in which the debtor, in consequence of the mortgagor's declaration that he would not call upon him to pay rent for the mortgaged premises, continued in them instead of selling them for payment of the debt; and it seems that this rule will be more readily applied to the release of interest than of principal, because an intention to release the latter would probably be evidenced by the giving up of the security (*a*). So if the promise to release were coupled with a condition, which has been performed by the debtor, and amounts to a consideration for the release;—as payment of the probate and legacy duty upon a debt promised to be released by the legatees of the creditor (*b*).

**1295.** If a mortgagee have been induced by the mortgagor to re-convey to him, in consideration of the substitution for his mortgage of other securities, which are afterwards found to be fictitious, the re-conveyance is void, and cannot be set up either by way of estoppel or otherwise against the maker;

(*w*) Per Lord Loughborough, *Byrn v. Godfrey*, 4 Ves. 10; per Wigram, V.-C., in *Cross v. Sprigg*, 6 Hare, 556; 2 Mac. & G. 113. And see observations of Turner, L. J., in *Taylor v. Manners*, L. R., 1 Ch. 48.

(*y*) Per Lord Hardwicke, *Harrison v. Owen*, 1 Atk. 520; see *Gummer v. Adams*, 13 L. J., N. S., Ex. 40.

(*z*) *Yeomans v. Williams*, L. R., 1

Eq. 184; 35 Beav. 130; and see per Turner, L. J., *Taylor v. Manners*, L. R., 1 Ch. 48. See also *Money v. Jorden*, 2 De G., M. & G. 318; revd. 5 H. L. C. 185, diss. Lord St. Leonards; *Douglas, Exp.*, 3 Deac. & Ch. 310.

(*a*) *Yeomans v. Williams*, and see *Cross v. Sprigg*, sup.

(*b*) *Taylor v. Manners*, L. R., 1 Ch. 48.

whose equity against the estate is paramount over the title of mortgagees puisné to him, whether they lent their money before or after the date of the release; and although, if the re-conveyance had been made to them instead of to the mortgagor, they might have been protected as purchasers for valuable consideration without notice of the fraud (*c*). But the prior mortgagee will be restored to his position without prejudice to the rights of persons who are alleged to have lent money on the faith of the release (*d*).

**1296.** A creditor who has released the surety on the strength of a substituted security, which turns out to be invalid and fraudulent, will also be restored to his rights against the surety, although the latter were innocent of the fraud; being, however, bound to restore to their former position persons who had made advances to the surety on the faith of his release by the creditor (*e*). And it was said that the result would have been the same if the substituted security had failed through mistake, instead of fraud. Nor can a surety, who has been released in consequence of his own misrepresentation, be excused from liability on the ground that he was prevented by the release from suing the principal debtor, though the misrepresentation were innocent on the part of the surety.

But if after a release has been fraudulently obtained the mortgagor, with the concurrence of the puisné incumbrancer, makes another security, under which the estate is sold, it cannot be followed against the purchaser claiming for value, without notice, and on the faith of the release; nor can any part of the purchase-money, which has been received by the puisné incumbrancer without notice of the fraud, be recovered from him (*f*).

**1297.** A judgment may be discharged by release (*g*); but the release from a judgment of part of any of the hereditaments charged therewith does not now affect the validity of

(*c*) *Eyre v. Burmester*, 10 H. L. C. 90; 8 Jur., N. S. 1019.

(*d*) *Id.*; *Scholefield v. Templer*, 4 De G. & J. 429.

(*e*) *Scholefield v. Templer*, *supra*.

(*f*) *Eyre v. Burmester*, 10 Jur., N. S. 379, 687.

(*g*) *Litt. s.* 507.

the judgment as to the hereditaments remaining unreleased, or as to any other property not specially released; without prejudice nevertheless to the rights of all persons interested in the hereditaments or property remaining unreleased, and not concurring in or confirming the release (*h*). This is in accordance with the general law concerning pledges, that release of part of the security is only an extinguishment *pro tanto*; as, on the other hand, payment of part of the debt leaves the security complete for the residue (*i*).

**1298.** A debt may also be discharged by set-off, which however does not, as in the civil law, take effect in our courts *ipso jure*. In the absence of a special agreement both debts subsist notwithstanding the cross demands, and may be separately dealt with (*j*).

But the benefit of a set-off may now be obtained by way of counter-claim in an action to enforce the demand against which the right of set-off is claimed, subject to the power of the court or judge to refuse to allow it to be so disposed of, where it would be inconvenient or improper (*k*).



## CHAPTER IX. PART 3.—OF MERGER AND WAIVER.

**1299.** *Of Merger of the Debt.*

**1328.** *Of Merger of the Security.*

**1335.** *Of Waiver.*

**1299.** There shall not after the 1st November, 1875, be any merger, by operation of law only, of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity (*l*). But before this enactment, the rules of law were no guide upon this subject to courts of equity, which sometimes held a charge to be merged where it would have subsisted at law, and sometimes preserved it where at law it would have been merged (*m*).

(*h*) 22 & 23 Vict. c. 35, s. 11.

(*i*) Story, Bailments, § 301.

(*j*) *Pettat v. Ellis*, 9 Ves. 563; *Pinnock v. Harrison*, 3 M. & W. 532.

(*k*) Judicature Act, 1873, s. 24 (3);

Ord. XIX. (3).

(*l*) Supreme Court of Judicature Act, 1873, c. 66, s. 25 (4); Commencement Act, 1874, c. 83, s. 2.

(*m*) *Forbes v. Moffatt*, 18 Ves. 384.

**1300.** Where a person is or becomes entitled to the inheritance of an estate, of a charge upon which he is also the owner, and it is indifferent to his interests whether the charge should or should not subsist, a presumption arises in equity at his death (*n*), that the charge has merged in the inheritance (*o*). And if a person so entitled, or so entitled in equity (his trustees for sale having the legal interests), sell the estate free from incumbrances, he cannot say that there was no merger as against the purchaser (*p*). But the legal merger of a charge, by the conveyance of it and the estate to trustees, would not, it seems, before the late act affect the equitable interests of the owner of the estate if he be only tenant for life (*q*). The owner, if he will, may also preserve the charge; the presumption against merger being rebutted by some direct expression (*r*) by him of a contrary intention, or by such acts as equity will consider to be evidence of an implied intention; neither of which, however, will have any effect, until the time at which, but for the contrary intention, the charge and the estate would have become united in one person (*s*), or (if neither of these exist) where under the particular circumstances of the case it appears more for the benefit of the owner, that the charge should be kept on foot (*t*) (**1334**).

It appears to have been formerly thought (*u*), that the principle of merger applied only to the union of an equitable charge with the inheritance, and not where the charge is secured by a legal interest; but it is now well settled (*x*) that no such distinction exists.

(*n*) *Swinfen v. Swinfen*, 29 Beav. 199; 7 Jur., N. S. 89; *Allen v. Aldridge*, 6 Jur. 183.

(*o*) *Forbes v. Moffatt*, 18 Ves. 384; *Parry v. Wright*, 1 Sim. & S. 369; 5 Russ. 142; *Tyler v. Lake*, 4 Sim. 351; *Davis v. Barratt*, 14 Beav. 551; *Hatch v. Skelton*, 20 Beav. 453; *Pears v. Weightman*, 2 Jur., N. S. 586.

(*p*) *Bulkeley v. Hope*, 1 Kay & Jo. 482; 1 Jur., N. S. 864.

(*q*) *Id.*

(*r*) *Bailey v. Richardson*, 9 Hare, 734.

(*s*) *Tyrwhitt v. Tyrwhitt*, 32 Beav.

244; 9 Jur., N. S. 346; 32 L. J., Ch. 553; *Wilkes v. Collin*, L. R., 8 Eq. 338.

(*t*) *Forbes v. Moffatt*, *supra*; *Earl of Clarendon v. Barham*, 1 Y. & C. C. 688; *Gwillim v. Holland*, cited 18 Ves. 393; *Chester v. Willes*, Amb. 246.

(*u*) *Chester v. Willes*, *supra*; *Duke of Chandos v. Talbot*, 2 P. Wms. 601; *Thomas v. Kemys*, 2 Vern. 348.

(*x*) *Astley v. Milles*, 1 Sim. 298; *Gower v. Gower*, 1 Cox, 53; *Wyndham v. Earl of Egremont*, Amb. 755.

**1301.** These principles are of extensive application, not only as regards the rights of the owners and persons entitled to successive or limited interests in estates, and their representatives, but also as they affect the priorities of different incumbrancers by way of mortgage. Where, for instance, the purchaser of an equity of redemption pays off the first mortgage, and takes a reconveyance (*y*); or a mortgagee takes a conveyance of the equity of redemption, in consideration of the debts due to himself, and the other mortgagees, whom he covenants to pay (*z*); or an incumbrancer pays off arrears of head rent due on the estate, and afterwards purchases the inheritance (*a*), in all these cases the debt which has been discharged will, *primâ facie*, merge, as against the other incumbrancers.

So where a third incumbrancer, having notice of the second mortgage, bought the estate, contracting to pay off the incumbrances, and the first mortgagee reconveyed to a trustee for the purchaser in fee; the second mortgagee was held to have become first incumbrancer, both as against the purchaser and an incumbrancer from him, who, having constructive notice of the second mortgage, had advanced the money for payment of the first (*b*). So if a new mortgagee pay off the debt, and take an assignment of the mortgaged estate, but the deed contains no assignment of the mortgage debt, and no intention to preserve it is otherwise shown, the debt will be extinguished (*c*). Such an intention has, however, been inferred from an assignment of the estate to the new mortgagee in as full and beneficial a manner as that in which the original mortgagee could have held it (*d*).

**1302.** It has even been laid down, that the purchaser of an equity of redemption *cannot* keep up a charge for his own benefit. In the case of *Mocatta v. Murgatroyd* (*e*), the mortgagee of a ship had returned the bill of sale to the mortgagor,

(*y*) *Toulmin v. Steere*, 3 Mer. 210;  
*Mackenzie v. Gordon*, 6 Cl. & F. 883,  
 per Lord Cottenham.

(*z*) *Brown v. Stead*, 5 Sim. 535.

(*a*) *Garnett v. Armstrong*, 4 Dru.  
 & War. 182.

(*b*) *Parry v. Wright*, 5 Russ. 142.

(*c*) *Medley v. Horton*, 14 Sim. 226.

(*d*) *Phillips v. Gutteridge*, 4 De G.  
 & J. 531. See also *Irby v. Irby*, 25  
 Beav. 632.

(*e*) 1 P. Wms. 392.



who was thereby enabled to re-mortgage different parts of the ship to other persons, and the first mortgagee acquiesced in those mortgages. He afterwards took a release of the equity of redemption. It was held, that the subsequent mortgages should be preferred to his, because of his carelessness and acquiescence; and that though he had taken a release of the equity, it did not oblige him to pay the intermediate mortgages if he would waive the release.

In the case of *Greswold v. Marsham* (*f*), the mortgagee having notice of two out of three subsequent judgments, which had been confessed by the mortgagor, took (after a decree for foreclosure) a conveyance of the equity of redemption, and was decreed to pay the two judgment creditors; but the third had no relief because he gave no notice in time of his judgment.

These cases "are direct authorities," says Sir William Grant, M. R., "to show, that one purchasing an equity of redemption cannot set up a prior mortgage of his own, nor, consequently, a mortgage which he has got in, against subsequent incumbrances of which he had notice;" and applying the doctrine thus laid down to the case before him, the learned judge held (*g*), that the purchasers of an equity of redemption, who had paid off a prior mortgage out of the purchase-money, and taken a conveyance of the legal estate, could not set up that mortgage against an annuitant, who had originally taken subject to it. And Turner, L. J., when V.-C., referred to this judgment as good law (*h*), but his observation appears to have been extrajudicial, since he expressly declared the principle to be inapplicable to the case before him.

On the other hand, Knight Bruce, L. J., in a somewhat later case (observing (*i*) of the cases of *Mocatta v. Murgatroyd* and

(*f*) 2 Ch. Ca. 170.

(*g*) *Toulmin v. Steere*, 3 Mer. 210. In *Smith v. Phillips* it was held, that an equitable mortgagee, who had purchased the inheritance, was bound to perform an agreement for a lease made by the mortgagor, with notice of the mortgage, on the ground of merger; but it seems to have been thought that

the sale was expressly made subject to the claim under the agreement, though the validity of the claim was not admitted. (1 Keen, 694.)

(*h*) *Squire v. Ford*, 9 Hare, 47, and see *Chesshyre v. Biss*, 2 Gif. 287.

(*i*) *Watts v. Symes*, 1 De G., Mac. & G. 240.

*Greswold v. Marsham*, upon which Sir W. Grant expressly rested his doctrine, "I always doubted, and still doubt, whether the cases mentioned by him go that length"), held with Lord Cranworth, L. J., on appeal from the V.-C. of England, that a purchaser of an equity of redemption, who had paid off the first mortgage out of the purchase-money, might, having shown an intention of doing so, stand in the first mortgagee's place against the next incumbrancer. And it is submitted, that the doctrine attributed to Sir William Grant, is not in truth supported by the only authorities cited in support of it. In the case of *Mocatta v. Murgatroyd* it was indeed said, that the release did not oblige the prior mortgagee to pay the other incumbrancers, provided he would waive it; the inference it is presumed being, that if he would not waive it, he must pay them. But this is surely a loose way of expressing so broad a rule; and it seems by the report, that if the release had been waived, the first mortgagee could not have set up his mortgage against the later ones, because *by his acquiescence and carelessness*, he had been already declared to have lost his priority. Of even less value on this point seems to be the decision in *Greswold v. Marsham*. The two judgment creditors had there offered to redeem the mortgagee, who afterwards, and, it seems, behind their backs, got a foreclosure decree, and then took a release. Here there was an act of fraud, quite sufficient, it is presumed, to postpone the mortgagee. But in fact when the release was made there was nothing upon which it could operate. The equity of redemption had been already destroyed by the foreclosure. How then could a case, in which the release had no effect, be an authority for its alleged power of utterly destroying the mortgagee's original debt (*k*)?

1303. The decision in the case of *Toulmin v. Steere* will not justify the contention that if a first mortgagee purchase the equity of redemption from a mesne assignee, who took it subject

(*k*) It may be objected that the decision in *Toulmin v. Steere* was acquiesced in; but an appeal was signed against it, though not prosecuted, because a relative of one of the parties

paid the money to prevent further litigation. (5 Russ. 148.) Note also, that it was not necessary for the decision to lay down the rule so broadly.

to a mortgage to the original mortgagor for the purchase-money, the first mortgage is so merged that the mortgagor is relieved from his covenant to pay, and let in as a prior incumbrancer in respect of the security for his purchase-money (*l*); nor where the prior mortgagee has accepted a security on the mortgaged property, in a different form, from and in lieu of his original security under an arrangement to which the puisné incumbrancer is not a party and to which he does not accede, will the latter be allowed to claim the benefit of the merger (*m*). Nor will it enable the mortgagor to set up against his puisné incumbrancer (*n*) a prior mortgage created by himself, and of which he has obtained the benefit either by transfer, or by buying from the first mortgagee under his power of sale; because if the mortgagor pays off a charge on the estate, he does so for the benefit of the inheritance, and of all who are entitled to subsequent charges thereon. However, it is considered that a purchase by the mortgagor after several bonâ fide mesne transfers, might be set up, since the mortgagor would not then be found paying into the hand of the prior mortgagee, money which he is bound by his contract to pay in discharge of his debt.

**1304.** It has also been held that a term in the hands of a trustee for a mortgagee, does not become a satisfied term so as to deprive the mortgagee of its protection against the dower of the bankrupt's wife; by reason that the mortgagee has taken a conveyance of the fee discharged from the equity of redemption, in consideration of his releasing the bankrupt's estate from the debt (*o*).

**1305.** The trustees of a deed for the benefit of creditors, by which all the real and personal estate of the debtor has been conveyed to them, do not thereby become owners of the estate, so as to cause the merger of a judgment assigned to them by one of the creditors (*p*).

(*l*) *Haydon v. Kirkpatrick*, 11 Jur., N. S. 836; 34 Beav. 645.

(*m*) *Stevens v. Mid Hants Railway Co.*, L. R., 8 Ch. 1064.

(*n*) *Otter v. Lord Vaux*, 2 K. & J. 650; 6 De G., M. & G. 638.

(*o*) *Anderson v. Pignet*, L. R., 8 Ch. 180.

(*p*) *Squire v. Ford*, 9 Hare, 47.

**1306.** The rights of the adult tenant in tail, and of the tenant for life, are governed by special equities arising out of the nature of their estates. Where an adult tenant in tail, having the ordinary rights which belong to that interest, pays off a charge, the presumption (but which arises from inference only, and may be rebutted by evidence) is, that he has done it to benefit the estate (*q*); contrary, it seems, to the earlier rule, which did not extend the presumption of merger to the case of tenant in tail (*r*). The presumption stands on the reasoning, that as the tenant in tail can, if he will, acquire the fee simple, an inference arises from his not doing so, that he intends the estate, which, in fact, passes by his forbearance to the remainderman, to pass to him freed from the charge.

**1307.** But no merger will be presumed of a charge paid off by one possessed of an estate defeasible under an executory devise (*s*); such a person is not within the principle which affects tenants in tail, because he cannot of his own act make his estate indefeasible; and although he is not like the tenant for life, because upon a contingent event his estate *may* become indefeasible, yet the same principle is applied to him which is applied to the tenant for life.

**1308.** As to whom, whether he be simple tenant for life or tenant for life with remainder in fee to himself (*t*), after contingent remainders, and whether (*u*) the estate be, or be not inalienable; the rule is, that by payment of the charge he shall be presumed to be a creditor for the amount, because of the scantiness of his estate, even though he have done no act to show such an intention; for it will not be supposed that

(*q*) *Jones v. Morgan*, 1 Bro. C. C. 217; *Kirkham v. Smith*, 1 Ves. 257; *Drinkwater v. Combe*, 2 Sim. & S. 340; *Smith v. Frederick*, 1 Russ. 208; *St. Paul v. Dudley*, 15 Ves. 173.

(*r*) *Duke of Chandos v. Talbot*, 2 P. Wms. 604; *Chester v. Willes*, Ambl. 246.

(*s*) *Drinkwater v. Combe*, 2 Sim. & S. 340. It seems, whether the execu-

tory devise take effect or not. In *Wigsell v. Wigsell* (2 Sim. & S. 364), the estate tail was not ultimately defeated, but here the defeasible estate was. See the observation of Sir A. Hart on these cases, 1 Sim. 345.

(*t*) *Wyndham v. Earl of Egremont*, Ambl. 753.

(*u*) *Countess of Shrewsbury v. Earl of Shrewsbury*, 1 Ves. jun. 227.

he would discharge a debt on another man's estate (*x*). And if tenant for life mortgage subject to a prior charge on the inheritance which he afterwards pays off, and procures to be assigned to a trustee for himself, and he and the trustee then sell for valuable consideration, the mortgagee of the tenant for life has no equity against the purchaser (*y*). And even if, upon payment of the charge, the tenant for life have taken an assignment, connecting it with the legal estate of inheritance, and have so *primâ facie* put an end to the charge, something is yet required to show an intention to exonerate the inheritance (*z*). No obligation is upon the tenant for life to declare or show any intention to keep up the charge, and the burden of proof is on those who claim to have the estate exonerated: but, it has been said, that the smallest demonstration that the tenant for life meant to pay the money himself will prevent his representatives from laying claim to it (*a*).

**1309.** Tenant in tail in remainder, who cannot at his pleasure acquire an absolute interest, but may be defeated by the birth of issue of another person (*b*), and tenant in tail with powers of leasing and jointuring, but who is restrained from alienation (*c*), stand in this particular in the same position as tenant for life.

And both as to tenant for life and tenant in tail in remainder the equities remain unchanged, though the one afterwards acquires the fee and the other an estate capable of enlargement into a fee, and the existence of which at the time of payment of the charge would have caused a merger (*d*). The charge, however, only remains unmerged in the case of the tenant in tail in remainder where he has become entitled to it by payment. Where it devolves upon him without any act on his

(*x*) Jones *v.* Morgan, 1 Bro. C. C. 217; Faulkner *v.* Daniel, 3 Hare, 199; Jameson *v.* Stein, 21 Beav. 5; Cole *v.* Stutely, 6 Jur. 314.

(*y*) Harman *v.* Forster, 1 D. & Wal. 637.

(*z*) Burrell *v.* Earl of Egremont, 7 Beav. 205.

(*a*) Id.

(*b*) Wigsell *v.* Wigsell, 2 Sim. & St. 364.

(*c*) Countess of Shrewsbury *v.* Earl of Shrewsbury, 1 Ves. jun. 227.

(*d*) Horton *v.* Smith, 4 K. & J. 624; Wigsell *v.* Wigsell, *supra*; Trevor *v.* Trevor, 2 M. & K. 675.

part, it will merge if no contrary intention be expressed, and it be indifferent to him whether it shall merge or not (*e*).

Where tenant in tail is an infant, there is also no presumption of merger (*f*); for which one reason, viz. that non-merger was more beneficial for the infant, because he could dispose of the charge, but not of the estate, during his infancy, has now failed; but as the presumption of merger, in the case of tenant in tail, goes on the principle that he can acquire the fee, it seems there will still be no merger in the case of the infant tenant in tail. A payment by the order of the court out of an infant's estate will not cause a merger, as no intention to prejudice the estate or interest of the infant can be imputed to the court.

As the lunatic tenant in tail, like an infant, cannot acquire the fee, it seems there should be no merger in his case (*g*). But as to lunatics seised in fee, the charge will merge on the usual presumption, and because between the real and personal representatives, who are all volunteers, there is no equity to change the nature of the property (*h*).

**1310.** The principles respecting payment of charges by tenants for life apply only remotely, if at all, to the payment of bond debts, for by payment of a bond debt the legal right to sue is gone; and if the equitable right be preserved, by showing an intention to preserve it at the time of payment, the tenant for life is still only in the same position as other bond creditors. The presumption also is strongly against the intention, which, even if it exist, cannot be made available after such a lapse of time, that the bond creditor, if suing for himself, would have no right against the estate (*i*).

**1311.** The principle of want of equity to bring back a charge already merged also applies where after the merger

(*e*) *Horton v. Smith*, and see *Wyndham v. Earl of Egremont*, Ambl. 753.

(*f*) *Ware v. Polhill*, 11 Ves. 257; *Thomas v. Kemeys*, 2 Vern. 348. See 2 Ves. jun. 264, and *Bulkeley v. Hope*, 1 K. & J. 482.

(*g*) *Coote*, Mort. 397, ed. 3.

(*h*) *Lord Compton v. Oxenden*, 2 Ves. jun. 261.

(*i*) *Morley v. Morley*, 5 De G., Mac. & G. 610; and see *Roddam v. Morley*, 2 Kay & Jo. 336; *revd.* 1 De G. & J. 1.

the estate goes over. Thus, where the same person being tenant in tail in remainder of two estates, the produce of the sale of part of one of them was applied in redeeming the land tax on both; the land tax was held to have been so merged, that upon one of the estates passing from the tenant in tail to another person, the former had no equity to charge it with the money applied to the redemption (*k*).

**1312.** There may, however, be equitable circumstances, under which the remainderman must repay the charge to the representatives of the tenant in tail. Thus, where tenant in tail paid off a mortgage, secured by a term, of which he took no assignment, and afterwards settled the estate as if he were absolute owner, and gave legacies to the persons entitled in remainder by his will, which referred to the settlement; it was held (*l*), that those persons claiming the estate under the original settlement must make satisfaction for the charge to the personal estate of the tenant in tail.

**1313.** It remains to be considered, by what acts an intention against, or in favour of, merger may be shown by tenant in fee or in tail, and by tenant for life respectively.

The evidence may in the first place be either direct or presumptive (*m*), and parol evidence (*n*) may be used.

Merger may be prevented by a conveyance to a trustee, with an express declaration (*o*) that the object was to preserve priority in respect of the debt paid off. And where no assignment had been made, an express declaration of intention, in a case where a purchaser paid off the first mortgage, evidenced by the written declaration of the mortgagor that the purchaser should stand in the first mortgagee's place till the assignment, has also been held (*p*) sufficient to confer the priority of the latter upon the purchaser, although the payment was stated to be made out of the purchase-money, *in discharge of the first*

(*k*) *Harrison v. Round*, 2 De G., Mac. & G. 190; 17 Jur. 563.

(*l*) *Kirkham v. Smith*, 1 Ves. 257.

(*m*) *Hood v. Phillips*, 3 Beav. 513.

(*n*) *Astley v. Milles*, 1 Sim. 298, 345.

(*o*) *Bailey v. Richardson*, 9 Hare, 734.

(*p*) *Watts v. Symes*, 1 De G., Mac. & G. 240.

*mortgage*. And a statement in a residuary account passed by the owner of the estate at the stamp office, that he had retained a sum of money *towards* payment of the mortgage, coupled with his written instructions for the settlement of the estate, *after payment of the mortgage debt*, was held to show that he considered the charge to be in existence; but part of the estate being leasehold, no stress was laid upon an expression in his will, that the devisees should take the property with all the liabilities attaching thereto (*g*).

But a mere conveyance to a trustee without a declaration will not be sufficient (*r*); this being only one of the grounds upon which in equity the presumption of merger may be rebutted, and not decisive evidence against the merger.

Where a person entitled to a reversion purchased charges on the estate, which were conveyed to trustees, who declared that they held them for the purchaser, subject to the prior contingent rights and interests, but so that, as against the persons who might become entitled to such rights and interests, the charges should remain in existence; it was held clear, that they did not subsist as against his devisees (*s*).

**1314.** Where a declaration of trust is made, the intention of preventing merger should be clearly and unequivocally stated, and it will be considered that if the intention did exist, it would be expressed in such an instrument, and be accompanied by a declaration of trust of the charge. In a declaration of trust, therefore, the intention will not be inferred (*t*) from such a circumstance, as the form of a covenant by the trustee, to convey the estate to the owner, his heirs and assigns, or to such person as he, his heirs, executors, administrators or assigns should appoint. But a declaration that a mortgage term assigned to a trustee for the owner of the inheritance shall be held upon trust for him, his executors, administrators and assigns, without mention of his heirs, may assist strongly

(*g*) *Hatch v. Skelton*, 20 Beav. 453.

(*r*) *Parry v. Wright*, 1 Sim. & St. 369; 5 Russ. 142; *Hood v. Phillips*, 3 Beav. 513.

(*s*) *Lord Selsey v. Lord Lake*, 1 Beav. 146.

(*t*) *Hood v. Phillips*, *supra*.



the presumption against merger, provided it be made in the character of owner of the charge (*u*). Such a declaration made by the owner and another, where they happened to be trustees of the fund, was treated as a mere declaration of the trusts by which the fund was originally affected.

**1315.** The payment of interest, much beyond what the profits of the estate would have discharged, raises, in the case of tenant for life, a presumption that he meant to merge, and not to preserve the debt which he has discharged (*v*); and merger has been also held to be caused (in the absence of evidence showing a contrary intention) by the effect of a general release (*x*) by the tenant for life to the trustees of the settlement, by which a term was created in them for securing the charge; as amounting to a declaration that the charge should not be raised.

But, in considering the effect of a release, note that the general intention will be carried out, and conditional and provisional terms supported; so that where a judgment creditor executed a deed, by which the debtor conveyed all his real and personal estate for the benefit of creditors, and they covenanted that it should operate as a general release, but should not destroy the mortgage, pledge, lien or other specific security of any creditor, the judgment creditor was held not to have released the judgment so as to affect his priority over a subsequent judgment creditor, not a party to the deed (*y*).

**1316.** On the other hand, the presumption in favour of merger will be strengthened (though not concluded), if the owner of the estate dispose of it by will, making no mention of the charge (unless there be other charges to which the devise is subject, and which are also not mentioned), and using language calculated to exclude the existence of any charge on

(*u*) *Gunter v. Gunter*, 23 Beav. 571;  
*Tyrwhitt v. Tyrwhitt*, 32 Beav. 244;  
9 Jur., N. S. 346.

(*v*) *Jones v. Morgan*, 1 Bro. C. C.  
205.

(*x*) *Clifford v. Clifford*, 9 Hare, 675.

(*y*) *Solly v. Forbes*, 2 Brod. & Bing.  
38; *Twopenny v. Young*, 3 B. & C.  
208; *Green v. Wynn*, L. R., 7 Eq. 28;  
*Squire v. Ford*, 9 Hare, 47.

the estate (*z*), or under circumstances showing that it was not treated as subject to any charge (*a*). If the owner mortgage the estate absolutely without noticing the charge it will merge (*b*). And a charge secured by a term has been held to merge (*c*), contrary to the admitted intention of the owner, where he settled the estate, covenanting fully that it was free from incumbrances, even though he afterwards made a disposition by will, which showed that he considered it to be subsisting. But in a later case (*d*), where land tax had been redeemed by the guardians of an infant tenant in tail, who died, having bequeathed it (before the Wills Act) to the next tenant in tail, who suffered a recovery and made a resettlement by a particular description of the estate only, with the usual general words, and covenanted against incumbrances (*e*), with particular exceptions which did not refer to the land tax: but after the date of the settlement always received the land tax by distinct and separate payments from the tenants, and devised it by his will; it was held, that the settlement did not include the land tax, if there had been otherwise no merger. That there was none prior to settlement, seems clear on the authority of *Ware v. Polhill* (*f*), for the first tenant in tail died an infant, and the second was yet an infant when he took the estate, and down to the time of the recovery; and the acts after the settlement seem also sufficient to prevent merger; but *query*, if the construction of the deed itself can be reconciled with that in *Gower v. Gower*.

A prior charge will not be held to subsist, as against a puisné incumbrancer, where the owner of it, and of the estate, in disposing of the latter by an instrument to which the puisné incumbrancer was not a party, has provided that the charge shall not be raised (*g*).

### 1317. Even the express extinction of certain charges, and

(*z*) *Hood v. Phillips*, 3 Beav. 513;  
*Grice v. Shaw*, 10 Hare, 76; *Swinfen v. Swinfen*, 29 Beav. 199; 7 Jur., N. S. 89.

(*a*) *Pitt v. Pitt*, 22 Beav. 294; 2 Jur., N. S. 1010.

(*b*) *Tyler v. Lake*, 4 Sim. 351.

(*c*) *Gower v. Gower*, 1 Cox, 53.

(*d*) *Blundell v. Stanley*, 3 De G. & S. 433; and see *Neame v. Moorsom*, L. R., 3 Eq. 91.

(*e*) See also *Bulkeley v. Hope*, 1 Kay & Jo. 487; 1 Jur., N. S. 864.

(*f*) 11 Ves. 257.

(*g*) *Farrow v. Rees*, 4 Beav. 18.

the conveyance of the estate subject to another charge, does not necessarily imply an intention not to extinguish the latter; which may have been mentioned only to show the state of the title, and the nature and extent of the charges. And so it was held in a case in which the charge referred to was not capable of being extinguished at the date of the conveyance; the grantor being only contingently entitled thereto (*h*).

**1318.** There will be no merger, where merger would prevent the operation of a trust to which the interest in question is subject. Hence an annuity charged upon real estate in favour of a married woman for her separate use, will not merge in a life interest given her in the same estate, because the rents would then become subject to the control of the husband, contrary to the trust (*i*).

**1319.** If the tenant for life of a manor take a surrender of land copyhold of the manor, and treating it as copyhold afterwards covenant to surrender to a mortgagee, although the court will compel the remainderman to re-grant in his favour, there is no equity for a re-grant in favour of a person who does not claim under the mortgagee, and who would not necessarily take any interest under the re-grant to him (*k*).

**1320.** A charge may subsist for a limited purpose only, and may, although merged, be subject to liabilities as an existing charge. Thus, where a woman was entitled in fee to real estate, which descended to her from her father, subject to a mortgage made by him to secure money, to which she was also entitled; after making both the land and the money a security for an annuity and other monies, she devised the estate with other property, after payment of her own debts, and *after the affairs of her father should have been settled* (for the settlement of which she had previously given directions), to H., without referring to the mortgage debt. This was held (*l*) to cause

(*h*) *Johnson v. Webster*, 4 De G.,  
Mac. & G. 474; 2 Jur., N. S. 59.  
(*i*) *Byam v. Sutton*, 18 Jur. 847.

(*k*) *St. Paul v. Dudley*, 15 Ves. 167.  
(*l*) *Swabey v. Swabey*, 15 Sim. 106,  
502.

a merger, in favour of the devisee, such being the most natural way of discharging her father's debt to herself; but the mortgage debt, being in existence at her death, remained subject to probate and legacy duty.

**1321.** Where a tenant in tail in remainder, after a life estate, granted an annuity to the tenant for life, to cease upon his death, or upon the discharge, by the tenant in tail, his heirs, executors, administrators or assigns, during the life of the tenant for life, of certain heavy mortgages to which the estate was subject, the mortgages were held to have merged in the inheritance; for it could not be intended, in the absence of express provision, that the annuity should cease on payment of the mortgages, if the annuitant were to pay the interest to the tenant in tail, instead of the mortgagees; there being an obvious intention to relieve the tenant for life, and it being for the general benefit of the family that the estate should be exonerated (*m*).

**1322.** Where the evidence of the conduct or acts of the owner of the estate is none or neutral, the course most beneficial to himself will be considered as that which he purposed to follow. The facts, therefore (*n*), that the estate is subject to debts and legacies, or other charges, to which the charge in question is paramount (unless the estate be devised to the owner of such a charge (*o*)); even although from the state of the testator's assets the liability, in the case of debts and legacies, be of little apparent importance, the uncertainty whether the estate will be sufficient to bear all its burthens, and other matters which make it better for the owner of the estate to preserve than to merge the charges, will be taken as grounds for presuming his intention so to do.

But this reasoning as to paramount charges does not apply

(*m*) *Hoghton v. Hoghton*, 15 Beav. 278.

(*n*) *Forbes v. Moffatt*, 18 Ves. 384; *Earl of Clarendon v. Barham*, 1 Y. & C. C. C. 688; *Grice v. Shaw*, 10 Hare, 76; *Davis v. Barrett*, 14 Beav. 542;

*Byam v. Sutton*, 18 Jur. 847; *Faulkner v. Daniel*, 3 Hare, 199; *Hatch v. Skelton*, 20 Beav. 453.

(*o*) *Swinfen v. Swinfen*, 29 Beav. 199; 7 Jur., N. S. 89.

where the intermediate interests are created by the act of the owner himself. Therefore where the owner in fee of an estate, subject to a charge in which he had a contingent interest, created estates by his marriage settlement, it was held, upon the happening of the contingency, that the charge had merged, and a bill by the representatives of the owner to establish it was dismissed (*p*).

Where on the construction of an agreement no intention to merge a charge is apparent, and there is no other contract to do so, it will not be admitted (*q*) as a valid argument to destroy a presumption against merger, arising from the interest of the owner of the estate, that the honesty of the transaction would be affected by the presumption.

Where tenant in tail, believing himself to be seised in fee, subject to a term for securing a charge, made a mortgage as of the fee, and out of the proceeds paid off the charge, leaving the term outstanding, it was held (*r*), that though there was an intention to destroy the charge, yet, as the whole estate could not under the circumstances be enjoyed according to the whole intention, the term, never having been assigned, should be considered as subsisting to secure the amount of the original charge.

**1323.** The intention to merge will not be imputed to a person on account of particular dealings with the estate, where those dealings are carried out in a manner, or by words, only explicable on the supposition that the person concerned was ignorant of his rights; as where (*s*) a tenant for life, being also executor, paid off certain charges on the settled estate, under circumstances which showed his belief that in the character of executor and residuary legatee of the settlor he was bound so to do.

**1324.** Merger will not take effect, it seems, in favour of a

(*p*) *Johnson v. Webster*, 4 De G., Mac. & G. 474.

(*q*) *Davis v. Barrett*, 14 Beav. 542.

(*r*) *Earl of Buckinghamshire v. Hobart*, 3 Sw. 186; and see as to the

subsistence of the term, *Clifford v. Clifford*, 9 Hare, 675.

(*s*) *Burrell v. Earl of Egremont*, 7 Beav. 205.

person who acquires a title under circumstances amounting to evidence of fraud. Thus, where the legal owner of an estate, subject to a lien and a contract to execute a mortgage, and not being in possession of the title deeds, mortgaged the estate in fee to a person who made no inquiry for the deeds or into the title; and afterwards conveyed the equity of redemption to the prior incumbrancer (who had no knowledge of the legal mortgage), the prior incumbrance was not held to have merged in the equity of redemption (*t*).

**1325.** Where a charge was declared to bind the estate, and the necessary deeds for securing the charge were directed to be executed by the tenant for life and tenant in tail accordingly, but the proper means were not directed or taken to affect the fee simple of the estate; the tenant in tail in remainder, having refused to pay the charge, was directed (*u*) to execute all acts and conveyances proper to bind the inheritance.

The hint thrown out in the case of *Mocatta v. Murgatroyd* (*x*), that an incumbrancer who had got a release of the equity of redemption might avoid the merger of his security by waiving the release (**1302**), seems to have met with no further support (*y*).

**1326.** The 40th section of the Statute of Limitations (*z*), which forbids any proceeding for the recovery of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, but within *twenty* years after a present right to receive the same shall have accrued to some person capable of giving a discharge or release, unless some part of the principal money or interest shall have been paid, or acknowledgment of the right given in writing, signed by the person by whom the same shall be payable or his agent to the person entitled thereto or his agent; and in such case, but

(*t*) *Worthington v. Morgan*, 16 Sim. 547.

(*u*) *Ware v. Polhill*, 5 De G. & S. 455.

(*v*) 1 P. Wms. 395.

(*y*) *Brown v. Stead*, 5 Sim. 535.

(*z*) 3 & 4 Will. 4, c. 27. After the 1st January, 1879, *twelve* must be substituted for *twenty* years. (Real Property Limitation Act, 1874, c. 57, s. 8.)

within *twenty* years after such payment or acknowledgment, or the last of them if more than one: will not deprive the personal representatives of the benefit of a charge which has been paid off, where there is no assignable person liable to pay the charge, or who by the delay could be induced to suppose that it was abandoned or merged, or where the rent out of which the interest is payable, is receivable by, and belongs to, the person entitled to the interest: it being assumed by the act that there is a person by whom the charge is presently payable, or who is capable of paying the principal or interest, or of making an acknowledgment of the right thereto (*a*).

**1327.** Here it may be noticed, that upon the merger of tithes by virtue of the acts (*b*) passed for that purpose, the lands in which the tithes are merged become subject to such charges and incumbrances as affected the tithes before the merger, to the extent of the value of the tithes, and such charges and incumbrances have priority over any charges or incumbrances which affected the lands at the time of the merger, and the lands and their owners are subject (*c*) to the same liabilities in respect of the charges and incumbrances, as affected the tithes and their owners before the merger.

And by the operation of the confirmation clause in the latter act (*d*), which makes valid at law and in equity (subject to such charges and incumbrances) all instruments purporting to merge tithes, and made with the consent of the commissioners before the passing of the act, tithes have been declared to be effectually merged by the act of a person absolutely without title to them (*e*); it being held that both the intention and the words of the act were as much directed to cases in which the person effecting the merger had no title at all to the tithes, as to those in which he had merely an insufficient title.

(*a*) *Burrell v. Earl of Egremont*, 7 Beav. 205.

(*b*) 6 & 7 Will. 4, c. 71; 1 & 2 Vict. c. 64; 2 & 3 Vict. c. 62; 9 & 10 Vict. c. 73.

(*c*) 2 & 3 Vict. c. 62, s. 1; 9 & 10 Vict. c. 73, s. 19.

(*d*) 9 & 10 Vict. c. 73, s. 19.

(*e*) *Walker v. Bentley*, 9 Hare, 629.

*Of Merger of the Security.*

**1328.** The benefit of the security will also be lost when it merges in another security of a higher nature. As if a security by specialty or hypothecation be taken for a debt, which was only secured by simple contract (*f*), and if a person having a security by deposit of deeds, afterwards take a legal security on the same property for other advances, without any stipulation as to the first debt, the possession under the deed merges the former possession, and the security stands for the advances only (*g*). An original mortgage will not, however, be merged by a new mortgage on the same property taken as security for the old debt and further advances (*h*) (**1351**).

**1329.** It is a necessary condition for merger of a security, that the remedy given by the higher, be co-extensive with that under the inferior security. Therefore if several be indebted on a joint and several note, and some only of them execute a mortgage, the liability on the note will not merge in the covenant in the mortgage (*i*).

But the original remedy against several co-debtors may merge in a judgment obtained against one of them, if the debt be the same, and the creditor, having notice of the joint liability, elect to take his remedy against one of them only (*k*). In such a case, if the co-debtors become bankrupt, the creditor cannot prove against the joint estates. But a voluntary election to take the single remedy is necessary to effect the merger, which does not arise if the creditor has not an opportunity of suing the other co-debtors (*l*).

**1330.** There will be no merger unless the securities are

(*f*) See *Saunders v. Milsome*, L. R., 2 Eq. 573; *Elpis*, L. R., 4 A. & E. 1.

(*g*) *Vaughan v. Vanderstegen*, 2 Drew. 289.

(*h*) *Tenison v. Sweeny*, 1 J. & L. 710; see *Harris, Exp.*, L. R., 19 Eq. 253.

(*i*) *Twopenny v. Boys*, 3 B. & C. 208; *Ansell v. Baker*, 15 Q. B. 20;

*Sharpe v. Gibbs*, 16 C. B., N. S. 527; *Boaler v. Mayor*, 19 C. B., N. S. 76; 11 Jur., N. S. 565; 34 L. J., C. P. 230; explaining *Price v. Moulton*, 10 C. B. 561; *Bate, Exp.*, 3 Dea. 358.

(*k*) *Higgins, Exp.*, 3 De G. & J. 33; 4 Jur., N. S. 595.

(*l*) *Waterfall, Exp.*, 4 De G. & S. 199.



vested in the same persons (*m*); the interposition of a trustee for the creditor is therefore commonly resorted to for the purpose of preserving the remedies under the original security.

**1331.** It is also necessary for merger, that the debt comprised in each security should be the same. Therefore a bond conditioned for the payment of sums already, or thereafter to be advanced, will not destroy the remedy on simple contract for the existing balance of account (*n*); nor, on the other hand, will the remedy for a debt of an indefinite amount be merged in a bond for a limited sum (*o*).

**1332.** The same rules hold where the higher security consists of a judgment; for although, by suing out execution on the judgment, the debt will be extinguished to the extent of the sum realized by the execution, yet unless the demand be the same, and the judgment be confessed to the same persons who hold the inferior security, or it be shown that the judgment was accepted in satisfaction of the debt due on that security (*p*), or unless the creditor have elected to proceed against one only of the debtors (*q*), there will be no merger.

It is also held that a judgment or other higher security, which for ordinary purposes would extinguish the original debt, will not so extinguish it as to prevent the creditor from making the debtor a bankrupt in respect of that debt, so long as it remains unsatisfied (*r*).

**1333.** There will be no merger if the higher security be ineffectual. If, therefore, there be an equitable mortgage, with an agreement for a legal mortgage, and the latter be made but cannot take effect by reason of a prior act of bankruptcy, the bankruptcy which avoids it will revive the equitable security (*s*).

(*m*) *Bell v. Banks*, 3 Man. & G. 258; N. R. 497.  
3 Sc. N. R. 497.

(*n*) *Holmes v. Bell*, 3 Man. & G. 213.

(*o*) *Norfolk Rail. Co. v. M'Namara*,  
3 Exch. 628.

(*p*) *Drake v. Mitchell*, 3 East, 251;  
*Bell v. Banks*, 3 Man. & G. 258; 3 Scott,

(*q*) *Higgins, Exp.*, 3 De G. & J. 33;

4 Jur., N. S. 595.

(*r*) *Griffiths, Exp.*, 3 De G., M. & G.  
174.

(*s*) *Harvey, Exp.*, 1 Mont. & C. 261;  
3 Dea. 547.

**1334.** Merger of a security may be prevented by an expressed or implied intention to the contrary (1300). A recital in the security that it is given by way of further or collateral security, will prevent it both at law and in equity (*t*), and an intention against it may be sufficiently shown from the nature of the transaction, or the acts of the parties: as where a reversionary lease was deposited as security, and the debtor afterwards purchased and deposited with the same lender, as security for another sum, the lease in possession, it was held that there was no merger (*u*); and where a judgment debt entered up on a warrant of attorney given by an intended husband to his intended wife was held not to be avoided by the marriage, because it was in the nature of a marriage settlement (*w*). Nor will a surrender of the earlier security be implied on the ground that a security of a higher nature is vested in a trustee for the mortgagee, where no intention to abandon the earlier security is apparent (*x*).

### *Of Waiver.*

**1335.** Waiver, which presupposes that the person to be bound is cognizant of his rights (*y*), may be express or implied. In cases of express waiver, no greater scope will be given to the language than the words will naturally bear. A waiver clearly limited by the words to part of the security, will not, therefore, affect the mortgagee's right over the residue. Where a mortgagee surrendered his legal interest in a leasehold security to enable the mortgagor to provide another security, but stipulated against prejudice to any other security that he might have for his debt, he and his assignee were held to be still entitled to the benefit of the covenants in the first mortgage, the legal interest only, and not the covenants, being within the operation of the surrender (*z*).

(*t*) *Twopenny v. Boys*, 3 B. & C. 208; *Pennell, Exp.*, 2 M., D. & De G. 273.

(*u*) *Whitbread, Exp.*, 2 M., D. & De G. 415.

(*w*) *Dolling v. White*, 17 Jur. 505.

(*x*) *Locking v. Parker*, L. R., 8 Ch. 80.

(*y*) *Vyvyan v. Vyvyan*, 30 Beav. 65.

(*z*) *Greenwood v. Taylor*, 14 Sim. 505; *S. C. nom. Att.-Gen. v. Cox*, 3 H. L. C. 240.

On the other hand, the plain meaning of words will not be restricted, on the representation of one of the parties that a more limited waiver was intended. And where a party to a suit consented by the decree to waive all right of priority, the court refused (*a*) to vary the decree after inrolment, on the ground of mistake; referring, at the same time, to the danger of acting upon the supposition of what was intended by the parties, in the presence of a direct expression of intention.

**1336.** The court will not be anxious to *imply* waiver from a mere omission, or other circumstance, from which the intention cannot fairly be inferred. Thus, where it was provided by the mortgage deed, that, as between the mortgagor and his surety, a certain part of the security given by the principal, should be primarily liable to the debt, without mentioning the rest, it was held (*b*), that the surety upon paying off the debt, had not lost, by the omission, the right to a transfer of the whole security. So where the surety pays off the debt, or interest in arrear, his priority is not waived (*c*) in favour of a subsequent mortgagee, by reason of his payment having been included in the security of the latter, and of the surety's having taken from him a note to that effect. An intention to take an additional security, and not a waiver of his old right, is to be inferred from such a transaction.

An assignee who has completed his title to the property does not, by making an arrangement with the mortgagor, for sale of part of the estate, with the object of reducing the debt, forfeit his priority over the rest (*d*).

**1337.** Where a creditor, having a security on the funds of his debtor for part of his debt, takes another security on the same funds for his whole debt; or having a security upon his debtor's funds, takes afterwards, either alone, but on behalf of himself and another creditor, or jointly with such other creditor, a security for both debts on the same funds, the earlier

(*a*) *Drought v. Jones*, 4 Dru. & War. 174; and see 1 Cox, 56.

(*c*) *Beckett v. Booth*, 2 Eq. Ca. Abr. 595.

(*b*) *Bowker v. Bull*, 1 Sim. N. S. 20; 15 Jur. 4.

(*d*) *Martin v. Sedgwick*, 9 Beav. 333.

and (in the second case) separate security keeps its force and rank, and may be separately dealt with (*e*). Hence, where a purchaser had given several bills of exchange for the purchase-money of a ship, and directed his agent to pay the amount of one of such bills to the vendor, out of the earnings of the ship, and afterwards directed the same agent to pay out of such earnings the amount of any current bills given in payment for the ship; and the agent having accepted both orders, discounted the first bill, without notice of any other priorities, he was taken to have discounted it, as he had a right to do, on the faith of its giving a first lien upon the freight: and his lien was accordingly preferred to that of the holders of the other bills.

**1338.** A mortgagee may lose his right to payment of his mortgage debt out of the security in preference to all other claims thereon, by carrying on or adopting proceedings which are inconsistent with that right. If a legal mortgagee commence (*f*) a suit for administration and sale of his deceased mortgagor's estate, or adopt (*g*) such a suit,—as by filing a bill of revivor where the original suit has become defective, praying for the benefit of that suit, or even by coming in and seeking the benefit of the decree in the original suit—instead of suing for foreclosure, which is the remedy proper to his security; by thus seeking a new right which is not included in his contract, he comes within that rule of administration suits, which makes the costs of the suit costs of administration, and payable, in the first instance, out of a deficient estate in preference to the debts of the deceased; and the mortgage debt is accordingly postponed to those costs.

But it was held, that an equitable mortgagee being entitled, by his contract, to sell the estate and to recover the difference by proof against the mortgagor's assets, might seek administra-

(*e*) *Miln v. Walton*, 2 Y. & C. C. C. 354.

(*f*) *Kenebel v. Scrafton*, 13 Ves. 370; *Wontner v. Wright*, 2 Sim. 543; and see *Brace v. Duchess of Marlborough*, Mose. 50; *Spensley's Estate*, Re, L. R.,

15 Eq. 16; but see *Prichard v. Fellows*, L. R., 17 Eq. 421.

(*g*) *White v. Bishop of Peterborough*, Jac. 402; *Armstrong v. Storer*, 14 Beav. 535.

tion and sale (485) of the mortgagor's estate, and yet preserve his right to full payment in priority to the costs of suit (*h*); it being, however, now settled that foreclosure, and not sale, is the remedy of the equitable mortgagee (*i*), the reason for this distinction, which does not appear to have been before generally admitted (*j*), has ceased (834).

1339. The right of a legal mortgagee is not, any more than an equitable right, altered by a mere decree for sale, unless it appear that the terms, upon which the sale was conceded, exclude the usual right of priority; for a mere decree for sale works no change in the rights of the parties. Therefore a legal (*k*) or equitable (*l*) mortgagee, who simply consents, in a foreclosure (*m*) or administration (*n*) suit, to a sale of the estate, does not thereby give up his right to payment in priority to the costs of the suit; and if several incumbrancers' estates be sold under a decree, by consent of the incumbrancers, the proceeds of the sale of each will be treated as the estate would have been treated, the mortgagees being paid their respective debts, interest, and costs, according to priority, without a prior deduction of the costs out of the general fund (*o*).

If, immediately after the direction for an account of the principal and interest on the mortgage, the costs of the mortgagees

(*h*) *Tipping v. Power*, 1 Hare, 405.

(*i*) *Pryce v. Bury*, L. R., 16 Eq. 153.

(*j*) *Wade v. Ward*, 4 Dr. 602; notwithstanding *Macrae v. Ellerton*, 4 Jur., N. S. 967.

(*k*) *Hepworth v. Heslop*, 3 Hare, 485; *Carr v. Henderson*, 11 Beav. 415; *Cook v. Hart*, L. R., 12 Eq. 459; *Cutfield v. Richards*, 26 Beav. 241.

(*l*) *Wild v. Lockhart*, 10 Beav. 320; *Barnes v. Racster*, 1 Y. & C. C. C. 401.

(*m*) *Upperton v. Harrison*, 7 Sim. 444; *Wild v. Lockhart*, *Barnes v. Racster*; *Cook v. Hart*; *Cutfield v. Richards*, *supra*.

(*n*) *Chissum v. Dewes*, 5 Russ. 29; *Carr v. Henderson*, 11 Beav. 415; *Langton v. Langton*, 7 De G., M. & G. 30; 1 Jur., N. S. 1078. It was held,

in the court below in this case, that the mortgagee's claim should be postponed to the costs, on the ground that the proceedings were carried on by assignees of the equity of redemption for the safety of the estate; and that though, as between the incumbrancer and the mortgagor, the latter would have been bound to indemnify the estate against such charges, yet where the estate is deficient, and the equity of redemption in the hands of a purchaser (between whom and the mortgagee there is no privity of contract), the expenses should fall upon the estate, or upon funds derived therefrom, in priority to the mortgagee's claim. (18 Jur. 1092.)

(*o*) *Wild v. Lockhart*, 10 Beav. 320.

are directed to be taxed, there is an inference in the absence of express agreement, that the usual priority was intended to be reserved. (*p*).

And upon the same principle, if an equitable incumbrancer have consented to the sale of part of the estate to facilitate the execution of a trust deed for payment of the incumbrancers according to their priorities, he cannot be compelled to join in completing the sales on the terms that the purchase-moneys shall first be applied in discharge of the expenses of sale, or on any other terms than complete redemption (*q*).

**1340.** The rules, therefore, are,

I. That if a mortgagee, not being by his contract entitled to such relief, commence, join in, or actively seek the benefit of a suit for sale and administration of the incumbered estate, he will lose his priority over the costs of that suit.

II. That by simply consenting to the sale in a foreclosure or administration suit, the legal or equitable mortgagee only settles the alternative, in which the decree directs that the sale be made (i. e. free from or subject to incumbrances), but does not waive his right to priority against the proceeds.

The statutory power which enables the court to decree a sale instead of foreclosure does not affect these rules, even as regards the infant heir of the mortgagor (*r*).

**1341.** A personal decree for payment of a debt against an executor and devisee, who has admitted his liability to pay the debt out of the property devised by the deceased debtor, is consistent with the preservation of the liability against the estate, though no remedy be given against it by the decree (*s*).

**1342.** A person who claims under a puisné incumbrancer, but has an advantage over an earlier one by virtue of the custody of deeds, and a declaration of trust (**1341**), does not forfeit

(*p*) *Barnes v. Racster*, 1 Y. & C. C. Mac. & G. 698.  
C. 401.

(*r*) See *Wade v. Ward*, 4 Dr. 602.

(*q*) *Crosse v. General Reversionary and Investment Company*, 8 De G., J. 158; 4 Jur., N. S. 959.  
(*s*) *De Sorbein v. Bland*, 2 De G. &

his advantage(*t*) upon purchasing the equity of redemption from the mortgagor, by contracting to retain part of the purchase-money to be applied in redeeming the prior mortgage, or (if no amicable arrangement could be made) in recovering the property adversely.

**1343.** When it is contended that the benefit of a security has been waived by the acceptance of another security in its place, it is for the owner of the estate to show that it was discharged by the taking of the new security, and not for the creditor to disprove the substitution of the new security for the old (*u*). The mere acceptance of a personal security for interest in arrear, or other charge whether expressed or implied, is therefore not a waiver of the original security, even if a receipt be given for the amount(*v*), though it is considered that against a purchaser for valuable consideration of a subsequent interest in the estate, on the faith of an assurance (supported by the receipt), that no interest was due to the first incumbrancer, the latter would lose his remedy against the estate (*x*).

The absence of any mention of the original security, and the reservation of interest at a different rate from that which was secured by it, have been treated as evidence that the new security was taken by way of substitution (*y*).

**1344.** The creditor may also, by various acts or omissions, waive or lose his right against the surety of the principal debtor. This will, of course, happen where the surety is discharged by reason of the giving by the creditor to the debtor

(*t*) *Stanhope v. Earl Verney*, 2 Eden, 81.

(*u*) This kind of extinguishment of a security was called in the civil law *novatio*; *positiva* where a new obligation was substituted for the former one; *cumulativa*, where a new one was created without destroying the first; with a *delegatio* when a new debtor was substituted; without it when the debtor and creditor remained the same, and the obligation only was changed. And (as it is in our law) the subse-

quent security was cumulative and not substitutionary, unless there were a clear expression of the *animus novandi*. (Colqu. Sum. R. C. L. §§ 1852—1855.)

(*v*) *Barrett v. Wells*, Pre. Ch. 131; *Hardwick v. Mynd*, 1 Anst. 111; *Curtis v. Rush*, 2 V. & B. 416; *Saunders v. Leslie*, 2 Ba. & Be. 509.

(*x*) See observations of Sir A. Hart, *Kemmis v. Stepney*, 2 Mol. 85.

(*y*) *Brettle v. Burdett*, 2 De G., J. & S. 244.

of further time, without the surety's consent; or where, by reason of any other of the various acts not directly relating to the security, a release takes place under the general law of principal and surety (*z*).

**1345.** As to those acts or omissions which relate directly to the security: a surety is entitled to the benefit of every security which the creditor had against the principal debtor, (704, 1153), the whole or any part of whose debt he has discharged (*a*); and in the case of a crown debtor may obtain an order to stand in the place of the crown and to have the benefit of an extent (*b*); and the creditor is bound to hold and preserve the securities for the benefit of the surety, so that on payment of the debt he may receive them unimpaired (*c*), whether the surety was or was not aware of the existence of the securities (*d*), and whether they were taken by the creditor before or after the contract of suretyship (*e*); and even though the surety have taken a particular indemnity upon other property; if he have done so without knowledge of the security held by the creditor, which was available for his own indemnity (*f*).

**1346.** The right of the surety extends to all the equities which the creditor whose debt he has discharged could have enforced, not merely against the principal debtor, but against

(*z*) See Pitman on Principal and Surety. And see *Rees v. Berrington*, and the notes thereon in 2 White & Tudor's Leading Cases in Equity.

(*a*) *Mayhew v. Crickett*, 2 Sw. 191; *Goddard v. Whyte*, 2 Gif. 449; 6 Jur., N. S. 1364; *Allen v. De Lisle*, 3 Jur., N. S. 928.

(*b*) *Reg. v. Salter*; *Reg. v. Robinson*, 1 H. & M. 274, 275, n.

(*c*) *Pledge v. Buss*, Joh. 663; 7 Jur., N. S. 695; *Capel v. Butler*, 2 Sim. & S. 457; per *Turner, L. J.*, *Wheatley v. Bastow*, 7 De G., M. & G. 261.

(*d*) *Mayhew v. Crickett*, *supra*; *Lake v. Brutton*, 18 Beav. 34; 8 De G., M. & G. 440.

(*e*) *Pledge v. Buss*, Joh. 663; notwithstanding *Newton v. Chorlton*, 10 Hare, 646; 2 Dr. 342; doubted by *Knight Bruce, L. J.*, 2 Jur., N. S. 840. See *Pearl v. Deacon*, 24 Beav. 186; 1 De G. & J. 461; *Coates v. Coates*, 10 Jur., N. S. 532.

(*f*) *Lake v. Brutton*, and see *Brandon v. Brandon*, 5 Jur., N. S. 256. Though under different circumstances, a person, who had made his own interest in the mortgaged property liable to the debt, was held to have lost his right against the principal security, by taking from the principal debtor by way of indemnity a security upon other property. (*Cooper v. Jenkins*, 32 Beav. 237.)



all who claim under him, and is, therefore, not affected by a further mortgage executed by the debtor to a person who had notice of the first mortgage, though the subsequent mortgagee got in the legal estate: nor by the circumstance that at the date of the first mortgage the surety was indebted to the principal debtor in respect of the mortgaged property (*g*). And where the debtor, having given collateral security for an original debt, afterwards borrowed a further sum which was guaranteed by the surety, he was held entitled to the benefit of the surplus value of the securities in his creditor's hands, after the discharge of the original debt, towards payment of that for which he was surety (*h*).

**1347.** Every person (*i*), who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled (*h*) to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security, shall or shall not be deemed at law to have been satisfied, by the payment of the debt or performance of the duty; and such person shall be entitled to stand in the place of the creditor, and to use all remedies, and, if need be, upon a proper indemnity, to use the name of the creditor in any action or other proceeding at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnity for the advances made, and loss sustained, by the person who shall have so paid such debt or performed such

(*g*) *Drew v. Lockett*, 32 Beav. 499; 9 Jur., N. S. 786.

(*h*) *Praed v. Gardiner*, 2 Cox, 86; *Copis v. Middleton*, T. & R. 224; *Hodgson v. Shaw*, 3 M. & K. 183, 195. But see *Allen v. De Lisle*, 5 W. R. 158. So, by the Dutch law, as adopted in British Guiana, the satisfaction of the principal debt extinguishes the mortgage or pledge, and the person who pays it has no right to stand in the

place of the original creditor without an express bargain that he may do so; the transaction being then an assignment, and not a discharge of the security. (*Wilkinson v. Simson*, 2 Moo. P. C. 275.)

(*i*) Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 5.

(*h*) See *Phillips v. Dickson*, 8 C. B., N. S. 391.

duty; and such payment or performance, so made by such surety, shall not be pleadable in bar of any such action or other proceeding by him: Provided, that no co-surety, co-contractor, or co-debtor, shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned persons shall be justly liable.

The statute applies to a co-debtor as well as to a surety, and gives a right to an assignment of a judgment against the debtors, although by discharge of the debt the judgment is satisfied (*l*).

Although, under this provision, a surety who discharges a specialty debt becomes a specialty creditor of the principal debtor, a specialty debt is not created by reason of the enforcement by the surety of his right to indemnity against a specialty debt for which he is liable but which he has not discharged (*m*).

**1348.** The surety being thus interested in the mortgaged estate, the neglect of the creditor to preserve the securities for the benefit of the surety will cause the release of the surety, either entirely or to the extent of the lost fund. Such may be the consequence of the creditor's wasteful application of the principal debtor's estate (*n*), or of his neglect to file a warrant of attorney, whereby he is prevented from entering up judgment and issuing execution in pursuance of his contract with the surety (*o*). So, if the loss of the property, to which the surety may look for indemnity, arise from any dealing between the creditor and the debtor, as where the latter surrendered to the creditor the lease, for the performance of the covenants in which the surety had given security (*p*); or if, instead of proving, as he ought to do, under the bankruptcy of the debtor, the mortgagee, without notice to the

(*l*) *Batchellor v. Lawrence*, 6 Jur., N. S. 1306.

(*m*) *Ferguson v. Gibson*, L. R., 14 Eq. 379.

(*n*) *Mutual Loan Fund Association v. Ludlow*, 5 C. B., N. S. 449.

(*o*) *Watson v. Allcock*, 1 Sm. & G. 319; 4 De G., M. & G. 242.

(*p*) *Lord Harborton v. Bennett*, 1 Beat. 386; and see *Ewin v. Lancaster*, 6 B. & S. 571.

surety, release the assignees and the bankrupt's estate in consideration of a conveyance of the equity of redemption (*g*). Nor can the creditor, as against the surety, apply the security in payment of any other debt than that for which the surety was liable. Hence, where a debt due from a tenant to a landlord was secured by a mortgage of furniture, and by a surety, and the landlord afterwards seized the same furniture for rent, it was held that the proceeds must first be applied in discharge of the mortgage debt (*r*).

**1349.** But the creditor is under no obligation not to assign the securities or the debt. Upon such an assignment the creditor's obligation to preserve the securities attaches upon the assignee, who also acquires the rights of the creditor against the surety; and those rights are not lost by the neglect of the assignee to give notice of the assignment to the surety; though by omitting to give such notice he will risk the consequences of a payment by the surety to the assignor (*s*). But if through the neglect of the creditor or his assignee to enforce or protect the security, the benefit of it be lost to the surety, he is discharged (*t*).

**1350.** When a surety pays off the mortgage debt of the principal debtor, being entitled to the benefit of all the securities, he may in bankruptcy set off the amount which thus becomes due to him from the owner of the equity of redemption, against monies due from himself to such owner: and where the equity of redemption belongs to a joint-stock company, to which calls are due from the surety, he may set off (*u*) his payment against the calls, as if he had been mortgagee when they fell due; and his right is not affected by the principle of the bankrupt law, by which a debt assigned after

(*g*) *Pledge v. Buss*, Joh. 663.

(*t*) *Strange v. Fooks*, 4 Gif. 408; 9

(*r*) *Pearl v. Deacon*, 24 Beav. 186; Jur., N. S. 943; *Wulff v. Jay*, L. R., 1 De G. & J. 461; 26 L. J., N. S., Ch. 7 Q. B. 756.

761. (*u*) *Barrett, Exp.*, 34 L. J., Bank.

(*s*) *Wheatley v. Bastow*, 7 De G., 41.

M. & G. 261.

the bankruptcy cannot be set off against a debt due to the bankrupt's estate.

**1351.** If a surety pay a sum of money in discharge of his guarantee, the security of the principal debtor not being delivered up, nor anything said about it, the conclusion is that the original security is intended to remain as to the balance, and it will not be treated as released (*x*).

**1352.** The discharge of one of several co-sureties or other joint debtors is a release at law (**1286**) of all of them (*y*), the effect of which will not be altered by any attempt on the part of the creditor to reserve his rights against the remainder (*z*). And under an agreement which operates as a satisfaction of a debt, though not as a release at law, the rights of the creditor cannot be reserved against the surety; such a reservation being inconsistent with the security (*a*).

**1353.** The lien of the vendor of land for unpaid purchase-money will not be destroyed, though the vendor take a draft, note or bill of exchange (*b*), negotiated (*c*) or otherwise (these being but modes of payment), for the unpaid purchase-money; nor by his taking security by mortgage, bond or covenant (*d*) from the purchaser himself; and as to a covenant, whether it be separate or contained in the purchase deed; nor in the case of land taken by a public company, where the sum due exceeds that paid into the bank, by the payment of the valuation and the giving of the bond under the act (*e*); nor by the purchase-money being made payable at a future day—as

(*x*) *Waugh v. Wren*, 9 Jur., N. S. 365.

(*y*) Y. B. 21 Edw. 4, 81, B. Pl. 33; *Nicholson v. Revill*, 4 A. & E. 675.

(*z*) *Evans v. Bremridge*, 2 K. & J. 174, notwithstanding *Giffard, Exp.*, 6 Ves. 805.

(*a*) *Webb v. Hewitt*, 3 K. & J. 438.

(*b*) *Hughes v. Kearney*, 1 Sch. & Lef. 132; *Grant v. Mills*, 2 V. & B. 306; *Gibbons v. Braddall*, 2 Eq. Ca. Abr. 682, M. N.; *Peake, Exp.*, 1 Mad.

346; *Gunn v. Bolckow*, L. R., 10 Ch. 492.

(*c*) *Loaring, Exp.*, 2 Rose, 79.

(*d*) *Tardiff v. Scrugban*, cit. 1 Bro. C. C. 422; *Elliott v. Edwards*, 3 Bos. & P. 181; *Nairn v. Prowse*, 6 Ves. 752; *Mackreth v. Symmons*, 15 Ves. 328; *Hope v. Booth*, 1 B. & Ad. 498, notwithstanding *Fawell v. Heelis*, 1 Bro. C. C. 421, n.; *Ambl.* 724.

(*e*) *Walker v. Ware, &c. Railway Co.*, L. R., 1 Eq. 195.

within a given time from the vendor's death (*f*). It may be saved, by a proviso that the estate shall not be assigned until payment (*g*), without the consent of the vendor and the surety of the purchaser.

**1354.** But if the consideration for the sale be the security itself, and not the sum secured (*h*); or if it appear by direct agreement, or can be clearly inferred from the circumstances, that the purchaser intended to rely upon the security only, and not upon the land, then the lien will be gone (*i*); for it is evident that the vendor has already got all that he bar gained for.

Now as the lien is lost in these latter cases, not by the mere taking of a security, but by the taking it by way of substitution for the purchase-money, the question becomes in a great measure one of intention, and must be decided by the circumstances of each case.

A stipulation for payment of the purchase-money within a certain time after a resale (*h*), and the taking of a security by bond and mortgage of part of the estate (*l*), have thus been held indicative of an intention to abandon the lien entirely, and so has a sale to a public company in consideration of an annual rent, because it is considered to be contrary to the intention that the vendor should have a right on non-payment to enter upon and destroy the works (*m*); and so in the case of a sale in consideration of the payment of an annuity for several lives to be secured by the bond of the purchaser; chiefly on the ground that the latter could not have intended to take the estate subject to such a burthen (*n*). So where the vendor was party to a mortgage, made by the purchaser to a

(*f*) *Winter v. Lord Anson*, 3 Russ. 488.

(*g*) *Elliott v. Edwards*, *supra*.

(*h*) *Winter v. Lord Anson*, 1 Sim. & St. 434; *Clarke v. Royle*, 3 Sim. 499; *Buckland v. Pocknell*, 13 Sim. 406.

(*i*) *Parrott v. Sweetland*, 3 Myl. & K. 655; *Winter v. Lord Anson*, 3 Russ. 492; *Albert Life Assurance Co., Re*, L. R., 11 Eq. 164; see *Collins v. Collins*,

31 Beav. 346; but *qy*.

(*h*) *Parkes, Exp.*, 1 Glyn & Jam. 228.

(*l*) *Capper v. Spottiswoode*, Taml. 21.

(*m*) *Jersey, Earl v. Briton, &c.* Dock Co., L. R., 7 Eq. 409; and see *Winter v. Lord Anson*, 1 S. & S. 434.

(*n*) *Dixon v. Gayfere*, 21 Beav. 120; 1 De G. & J. 655.

person who had advanced part of the purchase-money, his lien was held (*o*) to be gone. And the taking a mortgage for part, and of a note payable on demand for the residue of the purchase-money, has been held (*p*) to have a like effect; on the strong but perhaps (says Lord Eldon) (*q*) not conclusive inference, that the charge for a part showed an intention not to charge the residue. If the bond (*r*) instead of being given by the purchaser alone, be also joined in by sureties, it is thought that the lien no longer remains.

It has also been decided to be lost, by taking as special security a sum of stock, which, being sufficient or probably sufficient to cover the purchase-money, was held (*s*) to have been pledged, that the vendee might have absolute dominion over the land; and, on the same principle, it has been thought (*t*), a mortgage upon another estate of the vendee would have a like operation; the obvious intention being to burthen one estate, that the other might be free. Sir W. Grant was of opinion, that a totally distinct and independent security would be a substitution for the lien, and not a credit on account of it; by which he meant, says Lord Eldon (*u*), not that a security, but the nature of a security, might amount to satisfactory evidence, that a lien was not intended: and the latter learned judge adds, that a mortgage is not conclusive ground for the inference that a lien was not intended, and that he could put many instances, in which a mortgage of another estate for the purchase-money would not be decisive evidence of an intention to give up the lien.

The opinion of Sir W. Grant appears to be acquiesced (*x*) in as a general rule by Lord St. Leonards; and the doctrine which may perhaps be deduced from the different cases cited, is, that

(*o*) *Cood v. Pollard*, 9 Price, 544; 10 id. 109.

(*p*) *Bond v. Kent*, 2 Vern. 281.

(*q*) 15 Ves. 344; the report in Vernon, however, gives no reasons for the judgment.

(*r*) *Cood v. Pollard*, 10 Price, 109; Sugd. V. & P. 860, 11th ed.; 673, 14th ed.

(*s*) *Nairn v. Prowse*, 6 Ves. 752.

(*t*) Id.

(*u*) In *Mackreth v. Symmons*, 15 Ves. 348.

(*x*) V. & P. 862, 11th ed.; 675, 14th ed. For the cases and doctrine on this subject at length, see id., and *Mackreth v. Symmons*, 15 Ves. 323.

the taking a distinct security is always *prima facie* evidence that the lien has been abandoned; but that this inference may be rebutted by proof of an agreement, or of circumstances leading to a presumption of an agreement, to the contrary.

**1355.** Although the mere acknowledgment in the deed for the whole purchase-money will not *per se* affect the lien, yet the receipt may be given under circumstances which are inconsistent with an intention to preserve it; as where the vendor, having notice that the purchaser was buying with a certain trust fund, took from him a bond and deposit for a sum recited to have been lent him to complete the purchase (*y*).

**1356.** Where a surety undertook to pay the debt of his principal, and to keep down annuities granted by him, and to give him an indemnity against such annuities, upon having a mortgage in fee to secure the debt and value of the annuities, and afterwards the principal sold the reversion of the estate to the surety for the amount of principal and interest secured by the mortgage, it was held (*z*), that for part of the consideration, viz. the debt, there was a lien, but not as to the annuities; the silence as to the debt, and the fact that there was an indemnity against the annuities, being thought to show strongly that, as to the latter, the personal security of the surety was alone relied on. And it was held material, that the sale was only of the reversion of the estate, inasmuch as it was unlikely that a person dealing for the consideration of annuities, and the purchase of a reversion which might not fall in until all the annuitants were dead, would rely on that reversion in addition to the indemnity already given by the bond.

**1357.** The lien of the vendor of goods (268) is also not defeated by part payment of the price (*a*), or by recovery against the purchaser in an action for goods sold (*b*).

(*y*) *Muir v. Jolly*, 26 Beav. 143.

(*z*) *Mackreth v. Symmons*, 15 Ves.

328.

(*a*) *Hodgson v. Loy*, 3 T. R. 440;

*Feise v. Wray*, 3 East, 98.

(*b*) *Houlditch v. Desanges*, 2 Stark.

337.

But the acceptance of a negotiable security affects the lien. For, subject to the obligation of paying the price of the goods, the right of property and possession from the time of sale are in the buyer; and if a bill be drawn and accepted for the price, or credit be otherwise given, he may exercise control over the goods during the currency of the bill, or until the credit expire; though the right of possession will be defeated by his insolvency before he obtains possession (*c*).

**1358.** In other cases of possessory liens, it is also held to be generally inconsistent with the lien to take security for the debt, especially if the security be made to include interest; or to enter into a special contract for a particular mode of payment (*d*). But in the one case, the lien remains as to sums which are not covered by the security (*e*); and in the other, if a bill be merely taken without an agreement that it is to be in discharge of the debt, both debt and lien continue until the bill arrives at maturity, though the debt cannot be enforced during the currency of the bill (*f*). And the lien is not affected, where the security, not having been taken in discharge of the debt, (for upon evidence that it has been so taken the lien is at an end (*g*),) has turned out to be worthless (*h*). As the negotiation of a bill is an approval of it, such an act terminates a lien which is to exist by agreement until the delivery of good and approved bills for the debt (*i*). An equitable lien upon the title deeds of a debtor has been held to be discharged by the acceptance from his representative of a security upon a specific part of his estate (*k*).

(*c*) Per Bayley, J., in *Bloxam v. Sanders*, 4 B. & C. 941, and in *Miles v. Gorton*, 2 Cr. & M. 504; *Edwards v. Brewer*, 2 M. & W. 375. For a case in which taking acceptances did not destroy the lien, see *Solarte v. Maes Hilbers*, 1 L. J., N. S., K. B. 196.

(*d*) *Cowell v. Simpson*, 16 Ves. 280; per Tindal, C. J., in *Hewison v. Guthrie*, 2 Bing. N. C. 755; 3 Scott, 298; *Brownlow v. Keatinge*, 2 Ir. Eq. R. 243. The case of *Cowell v. Simpson* was doubted in *Stevenson v. Blakelock*, 1 Mau. & S. 535; but was adhered to by Lord Eldon in *Balch v. Symes*,

infra, and acknowledged in *Hewison v. Guthrie*.

(*e*) *Balch v. Symes*, T. & R. 87.

(*f*) *London and Birmingham, &c. Bank, Re*, 11 Jur., N. S. 316.

(*g*) *Bunney v. Poyntz*, 4 B. & Ad. 568; 1 N. & M. 229; *Pooley v. Budd*, 14 Beav. 34.

(*h*) *Davies, dem. Lowndes*, ten. 3 C. B. 823; *Bond v. Warden*, 1 Col. 583.

(*i*) *Horncastle v. Farran*, 3 B. & Ald. 497; 2 Stark. 591.

(*k*) *Mason v. Morley*, 34 Beav. 471; 11 Jur., N. S. 459.



But the lien of a salvage creditor has been held not to be discharged merely by the taking of another security which becomes worthless (*l*). A lien is discharged by proof under the bankruptcy of the debtor, the proof being considered as equivalent to payment (*m*). But it is not destroyed by a right of set-off (*n*).

Where the solicitors in a suit were changed, and a gross sum was paid to the new solicitors in satisfaction of all the costs in the suit, it was held that the lien of the former solicitors on the fund in court for their share of the costs was gone, though they were not parties to the settlement, and that their only remedy was against the solicitors who had received the money (*o*).

**1359.** A mortgagee, prior to the passing of the Debtors Act, 1869, did not lose the benefit of his security by taking the body of his debtor in execution (*p*), and if he obtained judgment in ejectment, he might still have execution against the debtor under judgment in an action upon the covenant (*q*). And a solicitor did not lose his lien by the execution of an attachment for non-payment of costs (*r*).

But if a judgment creditor, who under the powers of 1 & 2 Vict. c. 110, should have obtained any charge, or be entitled to the benefit of any security, should afterwards, and before the property so charged or secured should have been converted into money or realized, and the produce thereof applied towards payment of the judgment debt, cause the person of the judgment debtor to be taken or charged in execution upon such judgment, such judgment creditor relinquished and forfeited all

(*l*) *Kehoe v. Hales*, 5 Ir. Eq. R. 597.

(*m*) *Hornby, Exp.*, Buck. 351.

(*n*) *Pinnock v. Harrison*, 3 M. & W. 532.

(*o*) *Mornington v. Wellesley*, 4 Jur., N. S. 60. According to this decision a plaintiff in a suit may change his solicitor, and by arrangement with his successor may oust the former solicitor of his claim upon the fund. At law, where judgment was given in favour of a person who had employed a second attorney, the court would not permit the

latter to issue execution, without seeing that the first attorney's costs were paid; because of his lien. Per Lord Abinger, C. B., followed in the Exchequer in equity. *Potter v. Hyatt*, 2 Y. & C. 112.

(*p*) *Davis v. Battine*, 2 R. & M. 76.

(*q*) *Colby v. Gibson*, 3 Smith (K. B.) 516.

(*r*) *Bawtree v. Watson*, 2 Keen, 713; *Davies v. Bush*, Younge, 358; *Lloyd v. Mason*, 4 Hare, 132; *O'Brien v. Lewis*, 4 Gif. 396; 9 Jur., N. S. 620, 764.

right and title to the benefit of such charge or security (*s*). This provision did not apply to the arrest of the debtor in a foreign country upon mesne process in a new action for the debt ascertained to be due by the judgment, as such a proceeding was not an execution on the judgment (*t*); nor to the taking a defendant into custody for contempt of court (*u*); though that process were adopted as a mode of reaching the property.

The discharge of the judgment debtor from custody under a *ca. sa.* also operated as a satisfaction of the judgment (*v*).

**1360.** The power of imprisonment, which is vested in the court by the Debtors Act, 1869, on default in payment of any debt or instalment of a debt in pursuance of an order of court or judgment, does not operate as a satisfaction or extinguishment of any debt or demand or cause of action, or deprive any person of any right to take out execution against the lands, goods or chattels of the person imprisoned, in the same manner as if such imprisonment had not taken place (*x*).

**1361.** It follows from the rule which requires a continuous possession for the support of a possessory lien (**257**), that if after the debt in respect of which the lien is claimed has arisen, the owner is allowed to remove the property and to return it, the lien is gone. Therefore, an innkeeper, who allows a guest to depart with his goods, gives him credit for that time, and cannot afterwards detain them but for debts which arose after they were returned (*y*). But goods may be delivered by the vendor to the purchaser under an agreement for a lien, the effect of which is that the vendor only

(*s*) 1 & 2 Vict. c. 110, s. 16. In the Irish Act, 3 & 4 Vict. c. 105, s. 25, and see *Maguire v. O'Reilly*, 3 Jo. & Lat. 224.

(*t*) *Houlditch v. Collins*, 5 Beav. 497; 6 Jur. 935.

(*u*) *Roberts v. Ball*, 3 Sm. & G. 168; 24 L. J., N. S., Ch. 471; see *Wells v. Gibbs*, 3 Beav. 399.

(*v*) *Cattlin v. Kernot*, 3 C. B., N. S. 796.

(*x*) 32 & 33 Vict. c. 62, s. 5.

(*y*) *Hartley v. Hitchcock*, 1 Stark. 408; *Jones v. Thurloe*, 8 Mod. 172; *Jones v. Pearle*, 1 Str. 557; and see *Coppin v. Walker*, 7 Taunt. 237; *Bland, Exp.*, 2 Rose, 91; *Arteza v. Smallpiece*, 1 Esp. 23; *Bligh v. Davies*, 28 Beav. 211.

parts with the possession, and retains the property until payment (*z*).

By the redelivery of a pledge the creditor also loses his right to it; but the goods pledged, and it is presumed also such as are subject to a possessory lien, may be redelivered to the debtor as the agent of the creditor without a forfeiture of the creditor's right (*a*). If the pledge be redelivered for a temporary purpose, and the pledgor refuse to return it, the pledgee may sue for it in trover (*b*). If it be delivered back to the owner in a new character, such as that of a special bailee or agent, the pledgee is entitled both against the owner and a third person, the possession being consistent with his original right (81). But if he voluntarily place the pledge beyond his own power to restore it, as by agreeing that it may be attached at the suit of a third person, or by giving up possession to the pledgor, or consenting that he shall alienate or pledge it to another, it is a waiver of the pledge (*c*).

**1362.** The parting with the subject of the lien is also an abuse of, or inconsistent with, the right of possession derived from the lien. This right cannot be passed by a tortious transfer of the goods, as the property of the holder under the lien, and such an abuse of it will entitle the owner to maintain trover for them (*d*). But the holder, intending only to give security to the extent of his lien, may do so at law without forfeiting his claim, by delivering the goods to his creditor with notice of the lien, and appointing him to keep possession as the servant of the bailee (*e*); a transfer to an agent or trustee being also in equity no forfeiture of the lien (*f*), and in equity the benefit of a lien may be assigned with the debt in respect of which it is claimed (*g*). On the bankruptcy

(*z*) *Walker v. Clyde*, 10 C. B., N. S. 381.

(*a*) *Reeves v. Capper*, 5 Bing., N. C. 136.

(*b*) *Story*, Bailm. § 299; *Roberts v. Wyatt*, 28 Beav. 211.

(*c*) *Story*, Bailm. § 209; §§ 359—365.

(*d*) *Scott v. Newington*, 1 Moo. & R. 252; *Legg v. Evans*, 4 Jur. 197, Exch.

(*e*) *M'Combie v. Davies*, 7 East, 5.

(*f*) *Watson v. Lyon*, 7 De G., M. & G. 288; 24 L. J., N. S., Ch. 754.

(*g*) *Bull v. Faulkner*, 2 De G. & S. 772.

of the person entitled to the lien, it will also pass to his assignees (*h*).

It follows from this inability of the lien holder to transfer the property for any other purpose than the mere lien, that it cannot be taken in execution for his debt (*i*); the sheriff, subject to certain exceptions introduced by 1 & 2 Vict. c. 102, being entitled to seize nothing which he cannot sell.

**1363.** It is also inconsistent with and fatal to the lien if the holder claim to retain the goods for the debt of another than the rightful owner (*j*), or under another right than the right of lien (*k*); or, if in the case of a vendor, he authorize the purchaser to mortgage the property to a person who advances money for the purchase: against that person there can be no lien for the balance of the purchase-money (*l*). But it is no waiver of the lien, if upon demand of the goods the holder omits to state that he claims them under his lien (*m*); or if he claim more than he can make good; as where having only a lien for a specific sum he claims also for a general balance (*n*), though in the latter case he cannot object that no tender was made to him of the sum due on the specific lien (*o*).

**1364.** A loss of possession sufficient to destroy the lien may take place without an actual parting with the property. As if the holder take the goods in execution, and cause them to be sold by the sheriff, and become the purchaser from him; here his actual possession may suffer no interruption, yet he holds as a purchaser and not by right of his lien, and the sheriff must have had legal possession for the purposes of the sale (*p*). And if a factor, having a lien against his principal, allows him to sell, and orders his own warehouseman to de-

(*h*) *Hudson v. Granger*, 5 B. & Ald. id. 109.

27.

(*i*) *Legg v. Evans*, *supra*.

(*j*) *Dirks v. Richards*, 6 Jur. 562; Car. & M. 626; 5 Sc. N. R. 534.

(*k*) *Boardman v. Sill*, 1 Camp. 410, n.; *Weeks v. Goode*, 6 C. B., N. S. 367;

*Cannee v. Spanton*, 8 Sc. N. R. 714.

(*l*) *Cood v. Pollard*, 9 Price, 544; 10

(*m*) *White v. Gainer*, 9 Moore, 41; 2 Bing. 23; 1 C. & P. 324.

(*n*) *Scarfe v. Morgan*, 4 M. & W. 270.

(*o*) *Jones v. Tarlton*, 6 Jur. 349; 9 M. & W. 675.

(*p*) *Jacobs v. Latour*, 5 Bing. 130; 2 Mo. & P. 201.

liver the goods to the principal's broker, who sells and makes out a bill of parcels to the principal, the effect is the same as a delivery to the principal (*q*). But notice by a banking company to all its shareholders, that a dividend will be payable on a future day, is no waiver of the lien of the bank upon the dividends of a shareholder who is indebted to the company (*r*).

The distrainer of goods has no lien after they have been replevied, but is left to his remedy on the replevin bond (*s*).

**1365.** The possessory lien, however, is not destroyed where the loss of possession arises by mistake (*t*), or is involuntary. Hence the lien of the shipmaster, whose ship has been taken by an enemy, revives upon recapture, and the owner becomes a trustee for him (*u*), and it seems that the lien of a factor or broker, who has quitted possession voluntarily, will revive, if he can re-acquire possession (*v*); but the lien of the vendor of goods, after his possession has been determined in favour of the purchaser, will not revive by his replacing the goods in the vendor's possession for a different purpose, so as to enable the vendor to stop in transitu (*x*).

**1366.** As the lien will not arise where the possession was originally obtained by fraud or misrepresentation (*y*), so the parting with possession on a false representation will not affect either a pledge (*z*) or a lien; and the holder of goods who has been deprived of them by fraud, may recover them in trover, or, if he can, may re-possess himself of them (*a*).

**1367.** The lien of the vendor of goods is destroyed by

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| ( <i>q</i> ) <i>Kruger v. Wilcox</i> , Ambl. 252.  | <i>Barnard</i> , 2 J. B. Moore, 34; 8 Taunt.               |
| ( <i>r</i> ) <i>Hague v. Danderson</i> , 2 Exch.   | 149.   |
| 741.   | ( <i>x</i> ) <i>Sweet v. Pym</i> , 1 East, 4; <i>Valpy</i> |
| ( <i>s</i> ) <i>Bradyll v. Ball</i> , 1 Bro. C. C. | <i>v. Gibson</i> , 4 C. B. 837.                            |
| 427.   | ( <i>y</i> ) <i>Madden v. Kempster</i> , 1 Camp.           |
| ( <i>t</i> ) <i>Dicas v. Stockley</i> , 7 C. & P.  | 12.  |
| 587.   | ( <i>z</i> ) <i>Story</i> , Bailm. § 299.                  |
| ( <i>u</i> ) <i>Cheeseman, Exp.</i> , 2 Eden, 181. | ( <i>a</i> ) <i>Tyson v. Cox</i> , T. & R. 395;            |
| ( <i>v</i> ) <i>Whitehead v. Vaughan</i> , Cooke's | <i>Wallace v. Woodgate</i> , 1 Car. & P. 575;              |
| <i>Bankrupt Law</i> , 576, ed. 8; <i>Levy v.</i>   | <i>Dicas v. Stockley</i> , 7 Car. & P. 587;                |
|  | <i>Richards v. Symons</i> , 8 Q. B. 90.                    |

delivery of all the goods. The delivery of part of them may often destroy the lien, because it may import a delivery of the whole (1394); yet if it can be shown that there was an intention not to deliver the whole, but to separate the part delivered from the residue, the lien on the residue will hold (*b*). And where the goods remain in the vendor's warehouse, the mere giving a delivery order to the purchaser will not prevent the lien; even where by custom the goods would be considered the property of the holder of such an order (*c*). So if the key of the place in which the goods are, be given to the purchaser, the key of an outer inclosure being left with the vendor; because though the former may have access to the goods, the latter can prevent them from being removed (*d*).

1368. Nor is the right of the vendor to retain the goods lost by his charging the purchaser with warehouse rent on account of them (*e*), because the buyer having no right to possession until payment of the price, the vendor holding until payment may also charge the expense of doing so. In a case in which rent was actually paid, it was, however, adjudged (*f*) that the acceptance of the rent operated as a complete transfer to the purchaser as much as if the goods had been removed to his own warehouse; a decision which has sometimes been thought to be distinguishable on the ground of the actual payment, in the place of a mere charging of the rent; and has also been judicially approved (*g*), on the ground that there had been a sale to a sub-purchaser who had paid the first purchaser, and that where the right of the vendor to hold the goods was suspended (*i. e.* while the bill drawn and accepted for the price was running), and the right of a third person intervened who had paid rent to the vendor,

(*b*) *Bunney v. Poyntz*, 4 B. & Ad. 568; *Dixon v. Yates*, id. 313; *Payne v. Shadbolt*, 1 Camp. 427; see *Stubey v. Hayward*, 2 H. Bl. 504; *Perez v. Alsop*, 3 Fost. & F. 188.

(*c*) *Townley v. Crump*, 4 Ad. & El. 58; 5 N. & M. 606; 5 L. J., N. S., K. B. 14.

(*d*) *Milgate v. Kebble*, 3 M. & G. 100.

(*e*) *Bloxam v. Sanders*, 4 B. & C. 941; *New v. Swain*, Dan. & Ll. Merc. Ca. 193.

(*f*) *Hurry v. Mangles*, 1 Camp. 452.

(*g*) Per Bayley, J., in *Miles v. Gorton*, 2 Cr. & M. 504.

as for his own goods, the vendor could not say that he was not holding for such third person. It is not, however, clear that the rent was paid by the sub-purchaser. The statement is only that it was paid by the vendee; and subject to the distinction arising from the fact of actual payment, which seems to be unsubstantial, the decision in question appears in effect to have been overruled.

In another case (*h*), in which a bill had been accepted for the price of the goods, part only of the property was sold and delivered to a sub-purchaser: and the bill having been dishonoured, the vendor was declared entitled to hold the rest of the goods till payment of the price: the effect of a charge for warehouse rent by the vendor against the purchaser being considered to be a notification to the purchaser that he was not to have the goods till payment of the rent as well as of the price; and the right of the vendor in such a case is the same, whether goods had been specifically appropriated for the fulfilment of the contract or not (*i*). And again (*k*), where the purchaser had agreed to pay certain duties on the goods which were afterwards properly paid by the vendor, though the latter had given a delivery order, and the purchaser had paid warehouse rent, it was held that the purchaser had no right to possession until payment of the whole price of which the duties formed part.

**1369.** But the vendor's land, upon which the goods remain, may become the purchaser's warehouse if the delivery be in other respects complete. As where timber cut and measured was sold, to be paid for at a future day, according to quantity, with licence to the purchaser to remove at his pleasure; and the trees were marked by the purchaser and measured, and the cubical contents of each calculated, but the whole contents not ascertained, it was held that there was no lien: nothing substantial remaining to be done by the vendor (*l*).

(*h*) *Miles v. Gorton*, 2 Cr. & M. 504.

(*i*) *Griffiths v. Perry*, 1 E. & E. 680; see *Valpy v. Oakeley*, 16 Q. B. 941.

(*k*) *Winks v. Hassall*, 9 B. & C. 372.

(*l*) *Tansley v. Turner*, 2 Sc. 238; 2 Bing., N. C. 151; and see *Hammond v. Anderson*, 1 Bos. & P. N. R. 69; *Elmore v. Stone*, 1 Taunt. 458.

**1370.** Where credit was given on the sale of chattels, with an agreement that the vendor should have a claim on the goods until payment, it was held that the property passed to the vendee, and that the agreement was only a personal licence to resume possession of and retain the property, and was not available against a transferee claiming by the act of the vendor or by operation of law (*m*).

*Of the Right of the unpaid Vendor of Chattels to stop them in Transitu.*

**1371.** The lien of the unpaid vendor arises out of and until the completion of the contract of sale stands in the place of his original ownership (*n*) (**268**). We have seen that if the holder of a possessory lien upon a chattel abandon the possession of it, his lien is generally at an end (**1361**), and the owner resumes his full rights over it. But when a chattel is sold there is often an intermediate stage in which, although the unpaid vendor has parted with the property by the contract of sale, and with the actual possession to a carrier or other intermediate holder for the purpose of delivery to the purchaser, his ownership is yet not absolutely divested; for if before actual or constructive delivery of the chattel to the vendee the latter has become by insolvency unable to pay the price, the vendor may countermand the delivery and may resume the possession of the property.

**1372.** The property in the goods may also be revested in the vendor, by a rescission of the contract of sale, before the property and the possession have become united in the vendee. But this can be done only by consent of both parties to the contract (*o*); and the validity of the act may be subject to questions as to the right of the vendee to rescind, as against his general creditors. If therefore the vendee refuse to accept the goods before they are delivered, or desire the wharfinger not to deliver them to him, they will become revested in the

(*m*) *Howes v. Ball*, 7 B. & C. 481.

in *Bloxam v. Sanders*, 4 B. & C. 948.

(*n*) Per Heath, J., in *Oppenheim v. Russell*, 3 B. & P. 42; Per Bayley, J.,

(*o*) See *Heinekey v. Earle*, 8 El. & Bl. 410.



vendor only upon his assent to the arrangement, though the assent may be given after an act of bankruptcy by the vendee, provided the refusal were before that time, and the assent were given at the earliest period after notice of the refusal by the vendee (*p*) (1390).

But the vendor's right to countermand the delivery of the goods in the hands of an intermediate holder, is not dependent upon the vendee's consent; nor is it an unlimited power in the vendor to vary the consignment of the goods at his pleasure: it is only a particular privilege intended to protect him against the vendee's insolvency (*q*), and not only must it be exercised adversely to the vendee (*r*), but it has been said that if the vendor get back the goods by any means, provided he did not steal them, it would be inequitable to take them from him.

1373. Although the rescission of the contract, and the right of stoppage in transitu, thus differ, it has been thought that the latter may nevertheless have the effect of rescinding the contract of sale (*s*), and the question whether it has that effect has not yet been absolutely determined. But it is commonly thought that the stoppage in transitu (*t*) does not rescind the contract, but merely replaces the vendor in the situation which he occupied before he parted with the possession of the goods: and it was held by Lord Ellenborough, that where by the contract payment for the goods was to precede delivery, although the vendor had stopped them in transitu, he might after the time of credit had expired recover for them under a

(*p*) *Salte v. Field*, 5 T. R. 211; *Bartram v. Farebrother*, 4 Bing. 579; 1 Mo. & P. 515; *Atkin v. Barwick*, 1 Str. 165, explained in *Harman v. Fishar*, Cowp. 125. See *James v. Griffin*, 2 M. & W. 623; 6 L. J., N. S., Ex. 241.

(*q*) Per Lord Stowell, *Constantia*, 6 C. Rob. 321.

(*r*) Per Lord Ellenborough, *Siffken v. Wray*, 6 East, 370.

(*s*) See *Wentworth v. Outhwaite*, 10

M. & W. 436; and *Gibson v. Carruthers*, 8 M. & W. 321; per Lord Abinger.

(*t*) See per Lord Kenyon, *Hodgson v. Loy*, 7 T. R. 440; per Park, J., *Tucker v. Humphrey*, 4 Bing. 516; 1 Mo. & P. 392; per Lord Denman, *Martindale v. Smith*, 1 Q. B. 389; 1 G. & D. 1; and see *Wentworth v. Outhwaite*, *supra*; *Clay v. Harrison*, 10 B. & C. 99; 5 M. & R. 17; *Stephens v. Wilkinson*, 2 B. & Ad. 320.

count for goods sold and delivered, if he were ready to deliver them on payment of the price (*u*).

**1374.** The vendor's title, either in the case of rescission or of stoppage, is paramount to and cannot be affected by the claim of a wharfinger, or other person who comes into the possession of the goods during the transit, for a lien upon them as against the vendee (*x*).

**1375.** After an express rescission of the contract there can be no doubt that the vendor may resell the goods; and it seems that he may do so after such a constructive rescission as will arise by the neglect or refusal of the purchaser to pay for and remove the goods within a reasonable time after the vendor has requested him to do so (*y*); the resale in such a case would indicate the vendor's assent to the rescission. As to the vendor's right after stoppage, if the general opinion as to the effect of that act be correct, there can be no general right of resale until by subsequent circumstances the contract has been rescinded, except that where the goods are perishable it is thought they may be resold by the vendor under an authority derived from the same equitable principles which created the right of stoppage (*z*). It is presumed, however, that in such a case the sale would be allowed as a matter of necessity, and would not indicate a rescission of the contract.

**1376.** The first known cases in which the right of stoppage in transitu was allowed in this country (*a*) arose in the Court of Chancery, where it was said that if the consignors of goods consigned to a person, who becomes bankrupt before they arrive, can by any means get them again into their hands, or prevent their coming into the hands of the bankrupt "it was

(*u*) *Kymer v. Suwercropp*, 1 Camp. 109.

(*x*) *Richardson v. Goss*, 3 B. & P. 119; *Oppenheim v. Russell*, id. 42; *Morley v. Hay*, 7 L. J., K. B. 104; see *Nichols v. Le Feuvre*, 2 Bing. N. C. 81; 2 Car. & P. 469; 2 Sc. 146.

(*y*) See *Langfort v. Tiler*, Salk. 113.

(*z*) *Smith's Leading Cases*, 1, 750, ed. 6.

(*a*) As to the extent to which this right is allowed in foreign maritime states, see the judgment of Lord Abinger, C. B., in *Gibson v. Carruthers*, 8 M. & W. 321.

but lawful for them so to do, and very allowable in equity" (*b*). The right was afterwards enforced by the courts of law as an equitable right (*c*), adopted for the purposes of substantial justice; it is now treated as a common law right (*d*), founded upon the law merchant, and has for many years been so exclusively enforced and developed by the courts of law, that it has been thought to be an arguable question, whether, notwithstanding its equitable nature and origin, the Court of Chancery had any jurisdiction over it (*e*); the doubt being supported by some observations made by Lord Eldon, upon an *ex parte* application to restrain the sailing of a vessel, where goods of an unpaid vendor had been shipped with those of other persons (*f*); but in which case the bill was not framed as the bill of an unpaid vendor to realize a lien, or to take accounts. The equitable nature of the right, the taking of the accounts, the intermediate possession, and the protection of the property, clearly brought the matter within the province of a Court of Equity (*g*).

The appeal to a Court of Equity also became necessary where the right of stoppage existed, but its actual exercise was prevented by the alienation of the legal right to the goods—as where the consignee had indorsed over the bill of lading by way of security (*h*). The indorsee in such a case has the legal possession and property to the extent of his debt, but the original vendor's equitable right of stoppage remains subject to that claim, and may, it seems, be enforced, either directly or by way of marshalling (1149), through the vendor's right as a surety in respect of the surplus to compel the indorsee to

(*b*) *Wiseman v. Vandeput*, 2 Vern. 203 (1690); *Snee v. Prescott*, 1 Atk. 245; *Wilkinson, Exp.*, cit. Ambl. 400.

(*c*) *Per Park, J.*, *Tucker v. Humphrey*, 4 Bing. 516; 1 Mo. & P. 392.

(*d*) See *Oppenheim v. Russell*, 3 B. & P. 42; *Edwards v. Brewer*, 2 M. & W. 375.

(*e*) See *Schotsman v. Lancashire and*

*Yorkshire Railway Co.*, L. R., 2 Ch. 332.

(*f*) *Goodhart v. Lowe*, 2 J. & W. 349; see *Straker v. Ewing*, 34 Beav. 147.

(*g*) *Schotsman v. Lancashire and Yorkshire Railway Company*; and see *D'Aguila v. Lambert*, Ambl. 399, and *Wilkinson, Exp.*, cited there.

(*h*) *Spalding v. Ruding*, 6 Beav. 376.

resort to any other goods of the consignee which he may hold as security for the same debt (*i*).

**1377.** The questions which arise as to the exercise of this right, relate—

- I. To the character and position of the persons by and against whom it may be exercised.
- II. To the nature and situation of the property, against which it may be exercised.
- III. To the manner in which it should be exercised.

**1378.** I. The persons must stand in the relation of vendor and vendee; but for the purposes of stoppage in transitu, this relation is sufficiently constituted by those who deal together as consignor and consignee, where the former incurs any liability for the price of the goods (*h*), and though he be acting as the agent of the consignee in procuring the consignment (*l*).

A liability for, or an interest in the price of the goods, apart from the character of consignor or vendor, will not confer the right; it cannot be exercised by a mere surety for the price (*m*), for he has no ownership out of which the right can arise; nor by the purchaser of bills drawn by the vendor for the price of the goods, unless he have an authority from the vendor (*n*).

If a British merchant be licensed to send a ship to import a cargo from an enemy's country, the legalization of the transaction implies a corresponding right in the enemy vendor, to the proper remedies for securing payment; and therefore, to a right to stop the cargo on the insolvency of the purchaser, and to employ an agent in this country as may be necessary (*o*).

**1379.** The vendor or consignor must be unpaid; an actual or constructive payment of the whole price is inconsistent

(*i*) *Westzynthius, Re*, 5 B. & Ad. 817; 2 N. & M. 644.

(*h*) *D'Aguila v. Lambert*, Ambl. 399, 2 Ed. 75; *Feise v. Wray*, 3 East, 93.

(*l*) *Falk v. Fletcher*, 18 C. B., N. S. 403; 34 L. J., C. P. 146.

(*m*) *Siffken v. Wray*, 6 East, 370.

(*n*) *Bird v. Brown*, 4 Exch. 786.

(*o*) *Fenton v. Pearson*, 15 East, 419.

with the right. If, therefore (*p*), the purchaser make an arrangement with his creditors, and the vendor include the purchase-money in the composition, the right will be barred.

The right of stoppage is not affected by the giving of bills for the price, unless the bills were accepted as payment; or by part payment which only lessens the lien *pro tanto*, when the vendor has resumed possession: and it is not necessary for the vendor to tender back bills which the vendee has accepted (*q*). If a bill for the price, which was not agreed to be taken at the vendor's risk, be dishonoured before the arrival of the goods, the vendor may treat the matter as if no kind of payment had been made (*r*) (1358).

But in the analogous case of re-delivery by a pawnee of the pledge, upon the receipt of a cheque (which was dishonoured) when he might have had money, whereby he enabled the pawnor fraudulently to sell the property to another, it was held that the payment of the price to the pawnor was payment to the pawnee; and having stopped the delivery, he was held liable in trover to the purchaser (*s*).

The vendor is not bound to wait, until it be clearly shown by the result of the accounts that the vendee is the debtor. The vendor seizes at his own peril, and it is for the vendee or the holder of the goods who disputes the claim to show the non-existence of the legal right (*t*), though it has been intimated that where one consignment has been specifically sent in return for another, it may be necessary to wait for the settlement of accounts (*u*).

A vendor who has been paid, but who afterwards obtains possession of the goods fraudulently, for the purpose of assisting his immediate purchaser upon the insolvency of the sub-purchaser, will be liable in trover for the goods (*x*).

(*p*) *Nichols v. Hart*, 5 Car. & P. 179.

(*q*) *Hodgson v. Loy*, 7 T. R. 440; *Feise v. Wray*, 3 East, 93; *Davis v. Reynolds*, 4 Camp. 267; 1 Stark. 115; *Edwards v. Brewer*, 2 M. & W. 375. Per Parke, B., in *Van Casteel v. Booker*, 2 Exch. 691.

(*r*) *Wood v. Jones*, 7 Dowl. & R. 126; see *Pickford v. Maxwell*, 6 T. R. 52.

(*s*) *Zwinger v. Samuda*, 7 Taunt. 264.

(*t*) *Wood v. Jones*, *supra*; per Dr. Lushington, *Tigress*, 1 Br. & L. 38; 32 L. J., Ad. 97; 9 Jur., N. S. 361.

(*u*) *Wood v. Jones*, *supra*.

(*x*) *Spear v. Travers*, 4 Camp. 251.

**1380.** It is the insolvency or bankruptcy of the vendee or consignee, which entitles the vendor to stop the goods(y). But it is not necessary that there should be an actual insolvency at the time of the stoppage. If the insolvency happen before the arrival of the goods, the stoppage will be justified and the shipper will have the benefit of his caution. But if from mis-information or excess of caution the consignor have exercised his privilege prematurely, and there is no insolvency to justify it, the consignee, it is said, will be entitled to the delivery of the goods with an indemnification for the expenses which may have been incurred on account of the stoppage (z).

As the insolvency (a) of the vendee, by preventing him from performing his contract to pay for the goods, entitles the vendor to stop them, so if the vendee neglect to pay or to remit the proper bills for the price of the goods, where, by the contract, he ought to do so before they are delivered, the vendor may equally exercise his right (b). But if it be the business of the vendor to draw and send a bill to the vendee for his acceptance, and he neglect to send it, and enable the vendee to act as owner and to deliver part of the goods to a sub-purchaser, he cannot afterwards insist upon his lien against the residue (c).

**1381.** The right of stoppage in transitu being of an equitable nature ought not to be so exercised as to disturb the rights of third persons(d). The vendor's claim will, therefore, be defeated if the vendee, being lawfully entitled, have made an absolute and *bonâ fide* assignment (e) of the bill of lading for valuable consideration to a person who has no notice that the

(y) *Lickbarrow v. Mason*, 2 T. R. 63; 6 East, 19, n.; 6 id. 21; 4 Bro. P. C. 57; *Bloxam v. Sanders*, 4 B. & C. 948.

(z) Per Lord Stowell, *Constantia*, 6 C. Rob. 321; per Dr. Lushington, *Tigress*, 1 Br. & L. 38; 32 L. J., Ad. 97; 9 Jur., N. S. 361.

(a) As to the sense in which the word "insolvency" is used for this purpose, see *Smith's Mercantile Law*, 593, note, ed. 6.

(b) *Wilmshurst v. Bowker*, 5 Bing. N. C. 541; *Reversed* 7 M. & Gr. 882;

8 Sc. N. R. 571; but the reversal did not affect the general principle stated.

(c) *Green v. Haythorne*, 1 Stark. 447.

(d) Per Best, J., 2 B. & C. 546.

(e) *Lickbarrow v. Mason*, 2 T. R. 63; 5 id. 683; 6 East, 21, n.; 4 Bro. P. C. 57; *Gurney v. Behrend*, 3 El. & Bl. 622; *Pease v. Gloahed*, L. R., 1 P. C. 219; 3 Mo. P. C., N. S. 556; *Coventry v. Gladstone*, L. R., 4 Eq. 493. As to the evidence of the sale, see *Brain v. Harden*, 2 Car. & P. 52.

vendee is insolvent, or that the goods are not paid for; and it is not material that the indorsee knew that the goods had only been paid for by acceptances payable at a day which had not arrived at the time of the transfer (*f*). The criterion is whether the transferee have taken fairly and honestly, and he does not take otherwise if the original consignee at the time of the transfer have done all that the contract required concerning payment. But if the transferee have assisted in contravening the terms of the original sale or the rights of the consignor connected with it, as if he knew of the insolvency of the consignee, and that no bill was accepted for the price of the goods, or that being accepted it was not likely to be paid, his transfer is an act of fraud against the right of the original consignor, and will not affect it. Nor will the right of stoppage be affected by an assignment made by an insolvent debtor for the benefit of a creditor in consideration of a pre-existing debt (*g*).

1382. If it appear on the face of the bill of lading that the performance of some act, such as the payment of a certain draft—is to precede the delivery of the goods, the indorsee will take subject to the performance of the condition (*h*), unless, it seems, by the custom of any particular trade, the performance of the act was not necessary before delivery, notwithstanding the expressed condition (*i*).

1383. If the transferee make himself paymaster to the original vendor, he takes subject to the same liabilities as the vendee, and the vendor's right remains (*k*).

And as the transferee's right is founded upon the negligence of the vendor in parting with the evidence of the title to the goods, without payment of the price, so if, without negligence on his part, the bill of lading have been obtained by the fraudulent act of the consignee, as if the vendor holding the receipt of

(*f*) *Vertue v. Jewell*, 4 Camp. 31; *Cuming v. Brown*, 9 East, 506; 1 Camp. 104, and judgment of Lord Ellenborough there.

(*g*) *Rodger v. The Comptoir d'Es-compte de Paris*, L. R., 2 P. C. 393.

See *Chartered Bank of India v. Henderson*, L. R., 5 P. C. 501.

(*h*) *Barrow v. Coles*, 3 Camp. 92.

(*i*) *Barton v. Boddington*, 1 Car. & P. 207.

(*k*) *Salomons v. Nissen*, 2 T. R. 674.

the officer of the ship who received the goods the master be persuaded by the consignee to give him a bill of lading without the production of that receipt, the right of the transferee, notwithstanding his own innocence, will be against the shipowner or charterer only, and not against the original consignor (*l*). It will be remembered that every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, is now conclusive evidence of the shipment, as against the master or other person signing the same, although the goods may not have been so shipped; unless the holder of the bill of lading when he receives it shall have had actual notice of the nonshipment; the master being at liberty to exonerate himself from the misrepresentation(*m*).

**1384.** Although the property in the goods comprised in a bill of lading passed by the indorsement of the bill, the rights in respect of the contract formerly continued in the original shipper or owner(*n*). At present(*o*), the consignee or indorsee, to whom the property shall pass by virtue of the consignment or indorsement, has the same rights of suit, and is subject to the same liabilities in respect of the goods, as if the contract contained in the bill of lading had been made with himself. As the object of this provision was to extend the rights of the indorsee, and as the bill of lading is a contract between the consignor and the master or owner of the ship, and is collateral to the right of stoppage which arises between the consignor and consignee, the indorsee of a bill of lading for valuable consideration and without notice of the consignee's insolvency, does not by virtue of the statute become subject to the liability of stoppage in transitu by the consignor (*p*), independent of the subsequent (*q*) provision of the statute that the right of stoppage is not to be prejudiced or affected by it; which last provi-

(*l*) *Schuster v. McKellar*, 7 E. & B. 705. See *Hathesing v. Laing*, L. R., 17 Eq. 92.

(*m*) 18 & 19 Vict. c. 111, s. 3, Bills of Lading Amendment Act, 1855.

(*n*) *Thompson v. Dominy*, 14 M.

& W. 403; 18 & 19 Vict. c. 111, Preamble.

(*o*) *Id.* s. 1.

(*p*) *Kemp v. Canavan*, 15 Ir. C. L. R. 216.

(*q*) Sect. 2.



sion appears to preserve the rule that as a bill of lading does not like a bill of exchange pass by mere delivery to a *bonâ fide* transferee for value, without regard to the transferor's title, the vendor may stop against such a transferee unless his transferor had not merely possession but also a right to transfer (*r*); notwithstanding the rule now under consideration (1381).

But even the property in the goods will not pass to a transferee of the vendee so as to defeat the vendor's right of stoppage, by the delivery of a shipping note with a delivery order; and still less by the delivery of an invoice (which is nothing more than a bill of parcels) of the property (*s*).

The claim of the sub-purchaser cannot of course prevail against the right of the original vendor where the latter has not parted with the control of the goods (*t*). Nor will that right be displaced by the claim of the factor of the original vendee, in possession of the indorsed bill of lading, and under acceptance to the original vendee, in respect of which he would have a lien on the proceeds of the sale of the goods if they came to his actual possession (*u*).

Nor is the vendor's lien defeated by an attachment out of the Lord Mayor's Court (*x*) pending the transit, at the suit of a creditor of the consignee, the vendor's lien being the older and preferable claim.

### 1385. Upon the destruction by the vendee's absolute

(*r*) *Gurney v. Behrend*, 3 El. & Bl. 522.

(*s*) *Akerman v. Humphery*, 1 Car. & P. 53; 1 Mo. & P. 378; *Tucker v. Humphrey*, 4 Bing. 516; *M'Ewan v. Smith*, 2 H. L. C. 309. See, however, the observations of Lord Ellenborough in *Harman v. Anderson*, 2 Camp. 243, and *Lackington v. Harrison*, 8 Sc. N. R. 38. It is considered by Mr. Justice Blackburn (*Treatise on the Contract of Sale*), that notwithstanding the cases of *Spear v. Travers*, 4 Camp. 251; *Zwinger v. Samuda*, 7 Taunt. 265; 1 Mo. 12; *Lucas v. Dorrein*, id. 278, and *Keyser v. Suse, Gow*, 58, indorse-

ments of dock warrants, wharfingers' receipts, delivery orders, and such documents have no effect independently of the Factors Acts, but only betoken an authority to receive possession, because they do not like bills of lading represent property at sea, of which possession cannot be taken; and, being of modern origin, are not within the custom of merchants as to bills of lading.

(*t*) *Craven v. Ryder*, 6 Taunt. 433; 2 Marsh. 127; *Holt*, 100.

(*u*) *Patten v. Thompson*, 5 M. & S. 350.

(*x*) *Smith v. Goss*, 1 Camp. 282.

transfer for value, of the original vendor's right to stop the goods in transitu, he retains no right at law to the possession of them after the claim of the indorsee of the bill of lading has been satisfied (*y*). If, however, the transfer by the vendee be not absolute, but only by way of security (*z*), the vendor's right of stoppage remains, subject to the security; and will override a claim by the transferee to retain for a general balance due to him from the vendee; and the attempt of the original vendor to stop the goods will be construed as a resumption of his right, subject to the pledge or mortgage of the transferee. An indorsement and delivery of the bill of lading by way of pledge will not however divest the right of the consignor, where the pledgor is only an agent without power to bind his principal by the pledge (*a*).

**1386.** II. As to the nature and situation of the property against which the right of stoppage in transitu may be exercised.

It may not only be applied to goods the property of which is in the vendor, but also where he has only an interest in and a right to receive under a contract, a portion of certain goods which is afterwards to be ascertained and appropriated to the persons entitled (*b*).

It cannot be exercised by a debtor upon goods which he has consigned to his creditor, on account of, or as security for, a debt due to the latter, because from the time of the consignment the property is appropriated; and the arrangement cannot be rescinded like a mere direction to an agent to pay a sum of money (*c*).

It applies merely to the goods, whatever may be their condition at the time of the stoppage, and does not extend to

(*y*) *Westzynthius, Re*, 5 B. & Ad. 817; 2 N. & M. 644.

(*z*) *Id.*; *Spalding v. Ruding*, 6 Beav. 376. See *Coventry v. Gladstone*, L. R., 6 Eq. 44.

(*a*) *Newsom v. Thornton*, 6 East, 17. The case of a factor before the Factors

Acts.

(*b*) *Jenkyns v. Osborne*, 8 Sc. N. R. 522; 7 Man. & G. 678.

(*c*) *Vertue v. Jewell*, 4 Camp. 31; *Fisher v. Miller*, 1 Bing. 150. See *Smith v. Bowles*, 2 Esp. 578, which seems contra.

money paid by underwriters in respect of damages to the goods arising from delay in the voyage (*d*).

**1387.** As to the situation of the goods. It is of the very essence of the doctrine of stoppage in transitu that during the transitus the goods should be in the custody of some person intermediate between the seller who has parted with and the buyer who has not yet acquired actual possession (*e*). In order to ascertain the existence of this condition it will be necessary to consider—

1. The circumstances under which the goods are despatched by the vendor.

2. The nature of the possession of the person who receives them.

3. The acts which amount to delivery to the vendee, or to a taking possession by him of the goods.

**1388.** (1.) As a general rule, where goods are ordered by a purchaser to be sent to him by a carrier, although no carrier in particular be named, the delivery to the carrier by the vendor operates as a delivery to the purchaser (*f*); and if goods be shipped in a vessel belonging to the consignee, whether it be sent for the purpose of receiving the goods, or be a general ship (*g*), and the goods are there placed in the care of the consignee's agent, and are made deliverable to the consignee or his assigns, without any condition; or if the goods be shipped without condition for the account and at the risk of the vendee (*h*), the transit is at an end; and such a delivery will not be qualified, by the indorsement to a third person, of a bill of lading which has been fraudulently obtained in blank from the master of the ship (*i*).

(*d*) *Berndtson v. Strang*, L. R., 3 Ch. 588.

(*e*) Per Rolfe, B., in *Gibson v. Carruthers*, 8 M. & W. 321. *Berndtson v. Strang*, L. R., 3 Ch. 588; *Rodger v. Comptoir d'Escompte de Paris*, L. R., 2 P. C. 393.

(*f*) Per Lord Alvanley, *Dutton v. Solomonson*, 3 B. & P. 582.

(*g*) Per Parke, B., *Van Casteel v.*

*Booker*, 2 Exch. 691; *Ogle v. Atkinson*, 5 Taunt. 759; 1 Marsh, 323; *Humberston, Re*, De G. 262; *Schotsman v. Lancashire and Yorkshire Railway Co.*, L. R., 2 Ch. App. 332.

(*h*) *Wilmshurst v. Bowker*, 7 M. & G. 882; *Key v. Cotesworth*, 7 Exch. 595; 22 L. J., N. S., Ex. 4.

(*i*) *Ogle v. Atkinson*, *supra*.

**1389.** But if the vendor honestly reserve a *jus disponendi* by taking a bill of lading which makes the goods deliverable to him or his assigns, the property will not vest in the consignee (*k*) until the bill of lading is delivered to him; and the consignor's right of stoppage remains, even though the master, by signing a bill of lading in such a form, have exceeded his authority (*l*). If the operative words in the bill of lading make the goods deliverable to the consignor's orders, his right will prevail, although it be stated in the invoice that the goods are shipped on account of the consignees and consigned to them; and in the bill of lading itself, that the goods belong to the owners of the ship.

The taking a receipt from the officer of the ship in the name of the consignor, followed by a demand of a bill of lading, making the goods deliverable to himself or order, has also been considered, although the bill was refused, to show that the consignor did not intend to part with the property (*m*).

But the taking of such a bill of lading is not conclusive as to the vendor's intention. Such circumstances as the making of the bill of lading "freight free," the language of the invoice (although that instrument will not pass any property), and the immediate indorsement or transfer of the bill of lading to the consignee, may indicate, and will afford evidence for a jury, that the contract was really made on behalf of the consignee; and that the goods were really delivered to be carried on his account, and at his risk (*n*).

Where the ship does not belong to, but is chartered by the vendee, the fact that he is the charterer does not alone deprive the consignor of his right to stop the goods, more than if they were delivered on board a general ship for the same purpose (*o*).

(*k*) *Wait v. Baker*, 2 Exch. 1; *Jenkyns v. Brown*, 14 Q. B. 496; *Berndtson v. Strang*, L. R., 4 Eq. 481; 3 Ch. 588; *Fraser v. Witt*, 7 Eq. 54.

(*l*) *Van Casteel v. Booker*, 2 Exch. 691; *Turner v. Trustees of Liverpool Docks*, 6 Exch. 543; *Ellershaw v. Magniac*, id. 570.

(*m*) *Falk v. Fletcher*, 18 C. B., N. S.

403; 34 L. J., C. P. 146; see *Thompson v. Traill*, 2 C. & P. 334; 9 Dowl. & R. 31.

(*n*) *Van Casteel v. Booker*, supra; *Brown v. Hare*, 3 H. & N. 484; 4 id. 822; see *Brown v. North*, 8 Exch. 1.

(*o*) *Bohtlingk v. Inglis*, 3 East, 380; and see *Whitehead v. Anderson*, 9 M. & W. 518; *Moakes v. Nicholson*, 19 C. B., N. S. 290.

The vendor does not lose his right of stoppage if by arrangement with the vendee the bill of lading which had been sent to the latter, but which made the goods deliverable to the order of the consignor or his assigns, has been placed in the hands of a third person to secure the bills drawn on account of the purchase; if it appear from the facts that there was no constructive delivery (*p*).

**1390. (2.)** As to the possession of the carrier, or other intermediate holder of the goods.

It is to be noted, that the transit is not complete by the mere delivery of the goods at the place of destination; the delivery must be into the actual or constructive possession of the consignee (*q*); and even though they be placed upon his own premises, if it be done against his consent, or without his concurrence, it is no delivery (*r*), unless he have assented to their remaining before the vendor has applied to stop them. And if the buyer repudiate the goods, or take possession of them otherwise than as owner, there will be no delivery, although other goods included in the same contract were previously delivered and accepted (*s*) (**1372**).

A conditional delivery will also be incomplete unless the condition be performed. If the goods be deposited with the vendee's agent, upon the understanding that there shall be no delivery until payment, the vendor may resume possession (*t*) in case of non-payment. So if they be packed in coverings belonging to the vendee and then left upon a like condition with the vendor (*u*).

Further: so long as any act remains to be done for the purpose of separating and ascertaining the exact goods which are to be the subject of the contract, or of ascertaining their

(*p*) *Van Casteel v. Booker*, 2 Exch. 691; and see *Turner v. Trustees of Liverpool Docks*, 6 Exch. 543.

(*q*) Per Tindal, C. J., *Jackson v. Nichol*, 5 Bing. N. C. 508; 7 Sc. 590; *Coventry v. Gladstone*, L. R., 6 Eq. 44.

(*r*) *Heinekey v. Earle*, 8 El. & Bl. 410, 427.

(*s*) *James v. Griffin*, 2 M. & W. 623; 6 L. J., N. S., Ex. 241; *Bolton v. Lancashire and Yorkshire Railway Co.*, 35 L. J., C. P. 137; L. R., 1 C. P. 431.

(*t*) *Loeschman v. Williams*, 4 Camp. 181.

(*u*) *Goodall v. Skelton*, 2 H. Bl. 316.

weight or quantity, in order to fix the price, the vendor may assert his right (*x*), although an order to weigh and deliver have been given by the vendor, and have been entered and the goods transferred in the books of the wharfinger or other holder of the goods; and although the vendee have resold, and the original vendor have had notice of, and have acquiesced in the resale. It is the same where the sale includes all the goods in a warehouse, if the price depend upon the quantity, and the quantity be not ascertained (*y*); or where the price is fixed if the quantity be not made up (*z*). Before the goods which form the subject of the original contract are ascertained and separated, the sub-purchaser cannot be in a better position than the original vendee (*a*).

**1391.** Subject to these conditions, the constructive delivery is complete when the goods have been left at the place or with the person at which or to whom they are directed to be sent by the consignee, although for the purposes of the latter that may not be the ultimate destination of the goods. Therefore, where the purchaser directed the goods to be sent to a packer, who, upon receiving them unpacked and sent away part and repacked and retained the remainder, the latter were held to be no longer in transitu, although it was intended ultimately to send them elsewhere (*b*).

So if, without any special direction or ulterior place of destination in view, the goods have been delivered at the warehouse of a wharfinger, packer, or other person, and which is the usual place for the delivery of goods consigned to the vendee, or even at the waggon office of the carrier (*c*). And

(*x*) *Austen v. Craven*, 4 Taunt. 644; 5 id. 175; *Shepley v. Davis*, 5 id. 617; *Busk v. Davis*, 2 M. & S. 397; *Swanwick v. Sothorn*, 9 A. & E. 895; 1 P. & D. 648; notwithstanding *Whitehouse v. Frost*, 12 East, 614. See *Cowasjee v. Thompson*, 3 Mo. E. I. 422; 5 Mo. P. C. 165.

(*y*) *Withers v. Lyss*, 4 Camp. 237.

(*z*) *Wallace v. Breeds*, 13 East, 522.

(*a*) See *Moakes v. Nicholson*, 19 C. B., N. S. 209.

(*b*) *Leeds v. Wright*, 3 B. & P. 320; 4 Esp. 243.

(*c*) *Richardson v. Goss*, 3 B. & P. 127; *Scott v. Pettit*, id. 469; *Rowe v. Pickford*, 8 Taunt. 83; 1 Mo. 526; *Smith v. Hudson*, 11 Jur., N. S. 622; see *Nicholson v. Bower*, 1 E. & E. 172; *Noble v. Adams*, 7 Taunt. 59; 2 Marsh. 366.

where an ulterior place of delivery is mentioned in the original direction, if that delivery is to be the work of the specially appointed or accustomed agent of the vendee, the transit as regards the original vendor is complete. As if the goods be ordered to be sent to C. at X., for transmission to Y. Upon delivering to C. at X., the goods, until new orders be given by the purchaser to send them to their final destination, remain stationary in the hands of his agent; and the transit being complete, cannot commence *de novo* (*d*).

So if the order was to deliver at the port of C., for the purchaser at M., and at C. the goods were deposited with Y., who was unconnected with the carriers, and accustomed to receive goods for the consignee at his risk, but without charging warehouse rent; although this last circumstance may sometimes be material (1368, 1398), it is not conclusive against the consignee: and as the warehouseman was not the agent of the carrier, the transit was held to have been determined (*e*).

**1392.** The transit may be ended by the deposit of the goods in the carrier's warehouse, although they have been ordered to be delivered to him at a particular place, where the carrier has allowed them to remain for the vendee's convenience until he should give further directions for their disposal (*f*); and this, whether the vendee have exercised acts of ownership on the goods in the carrier's warehouse (*g*), or whether, in pursuance of a course of business between the carrier and the vendee, they have been left until they can be removed for shipping by the vendee's own agent (*h*): and although the carrier himself claim a lien upon the goods (*i*).

(*d*) *Dixon v. Baldwin*, 5 East, 174; *Wentworth v. Outhwaite*, 10 M. & W. 436; *Gibbes, Exp.*, L. R., 1 Ch. Div. 101; *Coates v. Railton*, 6 B. & C. 422, appears to disagree with *Dixon v. Baldwin*, and the vendee's agent had also had work done upon the chattels; as to which see *Cooper v. Bill*, 3 H. & C. 722. It also seems to disagree with *Smith v. Goss*, 1 Camp. 282.

(*e*) *Dodson v. Wentworth*, 4 Man. &

G. 1080; 5 Sc. N. S. 821; see *Hunter v. Beal*, cited 3 T. R. 444, but not approved by Lord Ellenborough, in *Dixon v. Baldwin*.

(*f*) *Foster v. Frampton*, 6 B. & C. 107; 9 Dowl. & R. 108; *Allan v. Gripper*, 2 Cr. & J. 218; 2 Tyr. 217.

(*g*) *Foster v. Frampton*, *supra*.

(*h*) *Scott v. Pettit*, 3 B. & P. 469.

(*i*) *Allan v. Gripper*, *supra*.

**1393.** (3.) As to the acts which amount to delivery by the holder, or to taking possession by the consignee of the goods.

The direction of the consignor to deliver the goods to the consignee at a certain place, does not imply a contract by the carrier with the consignor to deliver them at that place only. The consignee may receive them at any stage of the transit, and may change the place of delivery; and if he so receive them, the transit will be determined (*k*) for the purposes of the right of stoppage, as if they had been sent to their original destination. The transit will be complete even if the goods be delivered wrongfully, as upon the production of an undorsed bill of lading (*l*); or if the consignee, before they arrive, take them from the custody of the carrier without his consent, although he may be responsible for the wrong done to the carrier (*m*).

**1394.** The actual delivery of part of the goods may import a constructive delivery of the whole, where the part delivery was made to a sub-purchaser of the whole, and there appeared to be no intention either before or at the time of the delivery to separate that part from the rest (*n*). But the question depends upon the intention of the vendee in taking possession (1367).

If it appear that he intended to take possession only of part, for the purpose of delivery to a purchaser of that part, the right of lien and stoppage upon the residue will remain.

(*k*) *London and North Western Railway Company v. Bartlett*, 7 H. & N. 400; per Lord Alvanley, *Mills v. Ball*, 2 B. & P. 457.

(*l*) *Coxe v. Harden*, 4 East, 211.

(*m*) *Whitehead v. Anderson*, 9 M. & W. 518. It was formerly held that the consignee could not take possession until the completion of the transit; and therefore where after the assignees of the bankrupt consignee had taken possession of a cargo the ship was ordered out for quarantine, the transit was held to continue until the comple-

tion of the quarantine. *Holst v. Pownal*, 1 Esp. 240. It may be doubted whether, even if it were still necessary to complete the voyage before the consignee could take possession, the transit would now be held to commence de novo after the first arrival of the ship, in consequence of an order to go into quarantine, which is entirely unconnected with the purposes of the voyage.

(*n*) *Slubey v. Heyward*, 2 H. Bl. 504.



Therefore, where the vendor ordered the holder of the goods to weigh and deliver to the vendee, and the goods were weighed and invoices sent to the vendee, but no transfer into his name was made in the books of the holder, nor any warehouse rent paid by the vendee, a sale by him of part of the goods, and delivery of that part upon his order to the sub-purchaser, was held not to determine the vendor's right against the residue (*o*).

**1395.** The vendor's right of stoppage may be preserved through the imperfection of the delivery, although that arises from a matter entirely collateral to his right; viz. the right of the carrier to refuse to complete the delivery until payment of the freight (*p*) (**276**). So where goods were landed at a wharf not in the name of any consignee, but the entry in the wharfinger's book was "with freight and charges;" which, according to the evidence, showed that the wharfinger was to receive freight and charges for the master before delivering the goods, they were held to be still in transitu (*q*).

**1396.** It was once laid down that the "corporal touch" of the consignee or his agent was necessary to vest the property in the former. It has been long understood that this requirement, if indeed the expression was ever more than figurative, will be satisfied by the exercise of any act of ownership; but what act is sufficient for that purpose, it is often difficult to determine.

**1397.** The weighing and part removal by the purchaser, of goods which have been deposited in a warehouse, are acts which indicate that the possession is vested in him (*r*). So may the taking of samples, coupled with other circumstances

(*o*) See per Parke, B., *Jones v. Jones*, 8 M. & W. 431; *Tanner v. Scovell*, 14 M. & W. 28; *Bolton v. Lancashire and Yorkshire Railway Co.*, 35 L. J., C. P. 137; L. R., 1 C. P. 431.  
(*p*) *Crawshaw v. Eades*, 1 B. & C. 181; 2 Dowl. & R. 188.

(*q*) *Edwards v. Brewer*, 2 M. & W. 375.

(*r*) *Hammond v. Anderson*, 1 B. & Pul., N. R. 69; *Wright v. Lawes*, 4 Esp. 82; *Swanwick v. Sothorn*, 9 A. & E. 895; 1 P. & D. 648.

which show an intention to assume the ownership; for the mere taking of samples alone is an equivocal act, the object of which may be only to ascertain if the goods can be disposed of at the particular place, without any intention to take actual possession. The taking of samples will show an intent to take possession of the bulk of the goods, if the purpose of the transfer require that the transferee should have full possession of them; as if he be a trustee for creditors, among whom it is his duty to distribute the proceeds (*s*).

**1398.** The payment of warehouse rent by the vendee to the intermediate holder of the goods (*t*), or even notice from the latter requiring such rent, though none be paid, shows the possession to be in the vendee; it being, as regards the holder of the goods, evidence of a new agreement by him to hold them for custody on account of the vendee, and not for the purpose of sending them to their destination (*u*) (**1368**).

And although payment of rent by the vendor for the warehousing of the goods tends *primâ facie* to show that he has not parted with the possession of them, circumstances may rebut this presumption, as if it be shown that the vendor paid the rent according to a custom of the trade, during a certain time (which was still current) after the day of sale (*x*).

**1399.** It has been held that if the consignee or his assignee put his mark upon the goods at the place of deposit, it is sufficient to pass the possession (*y*). And if the vendor assent to a sale by the vendee, and allow the property to be marked by the sub-vendee, it has been considered to be such a recognition of the transfer as to displace the original vendor's right of stoppage (*z*).

But more recently it has been said to be doubtful (*a*), whether the acts of marking, taking samples, or the like, without removing the goods from the possession of the holder,

(*s*) *Jones v. Jones*, 8 M. & W. 431.

Pul., N. R. 69.

(*t*) *Wentworth v. Outhwaite*, 10 M. & W. 436.

(*y*) *Ellis v. Hunt*, 3 T. R. 464.

(*u*) See *Wright v. Lawes*, 4 Esp. 82.

(*z*) *Stoveld v. Hughes*, 14 East, 308.

(*w*) *Hammond v. Anderson*, 1 B. &

(*a*) See *Whitehead v. Anderson*, 9 M. & W. 518.

although the act be done with an intent to take possession, will amount to a constructive possession, unless accompanied by such circumstances as to denote that the holder was intended to keep the goods as agent for the custody of them, on the consignee's account. It seems, therefore, that the acts in question are hardly to be taken even as *prima facie* evidence of the vendee's possession; a doctrine which certainly will not simplify the settlement of rights of this nature.

**1400.** The holder of the goods cannot prolong the transit by wrongfully detaining and delivering the goods to other persons after they have been demanded by the consignee or his assignees in bankruptcy (*b*). The holder is justified in delivering them to the possessor of the first bill of lading which is presented, and is not bound to inquire into the comparative merits of claimants under different bills of lading (*c*).

**1401. III.** As to the manner of exercising the right of stoppage in transitu.

It entitles the vendor not only to countermand the delivery of the goods to the vendee, but to order re-delivery to the vendor himself (*d*): and it reverts in him such of the goods as were in transitu at the time of the stoppage, but without affecting the vendee's right to such as have actually been delivered (*e*).

**1402.** The validity of the stoppage does not, however, depend upon actual possession of the goods by the vendor (*f*). It may be effected by a mere notice to the person in actual possession of the goods; or, where he is an agent, by notice to his principal, provided the notice be given at such a time and under such circumstances that the principal, by reasonable diligence (which is all that he is bound to use), may communicate with his servant in time to prevent the delivery to the

(*b*) *Bird v. Brown*, 4 Exch. 786.

(*c*) See *Fearon v. Bowes*, 1 H. Bl. 364, note. Per Dr. Lushington in *Tigress, Br. & L.* 38; 9 Jur., N. S. 361; 32 L. J., Ad. 97.

(*d*) Per Dr. Lushington, *Tigress*, *supra*.

(*e*) *Wentworth v. Outhwaite*, 10 M. & W. 436.

(*f*) *Northey v. Lewis*, 2 Esp. 613.

vendee (*g*). The procuring the master of a ship to sign bills of lading to the vendor's order has been held to be a substantial compliance with the law of a foreign country, under which the unpaid vendor was entitled to recover possession of the goods by a judicial process (*h*).

**1403.** The goods may be stopped by the agent of the consignor, whose general authority to act for the consignor in such matters will, it seems, be sufficient (*i*). But as the mere indorsement of a bill of lading formerly passed only the property in the goods to the indorsee, leaving all rights in respect of the contract in the original shipper or owner of the goods (*k*), the indorsement without value, or otherwise than in pursuance of a contract to pass an interest in the goods, would not enable an indorsee to sue for them in his own name (*l*). The consignee of goods, or the indorsee of a bill of lading to whom the property in the goods shall pass by reason of the indorsement or consignment, has now all rights of suit, and is subject to the same liabilities as if the contract contained in the bill of lading had been made with himself. But as the statute (*m*) only affects indorsees, to whom the property in the goods passes by the indorsement, and does not prejudice or affect any right of stoppage in transitu, it seems that neither the mere agent, upon whom only an authority without any property is conferred, nor an indorsee to whom only the property without any rights under the contract would have passed by the indorsement before the act, will be more able to sue than he would have been before the act, in respect of rights accruing under a stoppage in transitu.

**1404.** Although an authority by the consignor to his agent to stop, be executed while the goods are in transitu, a stoppage made under that authority will not be valid unless it be

(*g*) *Litt v. Cowley*, 7 Taunt. 169; 2 Marsh. 457; *Whitehead v. Anderson*, 9 M. & W. 518.

(*h*) *Inglis v. Underwood*, 1 East, 514.

(*i*) See *Whitehead v. Anderson*, 9 M. & W. 518.

(*k*) 18 & 19 Vict. c. 111, preamble.

(*l*) *Waring v. Cox*, 1 Camp. 369; see *Coxe v. Harden*, 4 East, 211.

(*m*) 18 & 19 Vict. c. 111, ss. 1, 2.

executed during the transit; and a ratification by the agent, after the completion of the transit, of a stoppage made by an unauthorized person during the transit, will be of no avail (*n*).

The act of ratification must take place at a time, and under circumstances, when the ratifying party might himself have lawfully done the act which he ratifies.

A stoppage by a person who assumes to act as agent for the vendor may, however, be justified by an authority sent before the arrival of the goods, but which was not received till after the seizure; and although the terms of the authority were to rescind the contract; if it be clear that the intention was to authorize the stoppage (*o*).

**1405.** The carrier, wharfinger, or other person who comes into the possession of the goods as a middleman between the consignor and consignee, becomes liable in trover, if after proper notice from a consignor entitled to stop in transitu, he deliver the goods by mistake or otherwise to the consignee; because by the notice the property is revested in the consignor (*p*). The consignor is not bound to prove his title; it is sufficient if he assert his claim as vendor and owner; and the middleman is then bound to deliver the goods to him, unless he is aware of some legal defeasance of the right. The refusal to deliver is otherwise evidence of a conversion, and is a breach of duty (*q*) within the Admiralty Court Jurisdiction Act, 1861, by reason of which the ship will become liable under the jurisdiction of that court (*r*). And *à fortiori* if the holder of the goods have admitted the right of either of the claimants to possession, he cannot afterwards dispute the right of that person in an action for a wrongful delivery; either upon the ground of any usage of trade, or of the vendor's right of stoppage, or that the holder was bound to deliver

(*n*) *Bird v. Brown*, 4 Exch. 786.

(*o*) *Hutchings, app., Nunes, resp.*,

1 Mo. P. C., N. S. 243; 10 Jur., N. S.

109.

(*p*) *Litt v. Cowley*, 7 Taunt. 169.

(*q*) Per Dr. Lushington, *Tigress*,

Br. & L. 38; 9 Jur., N. S. 361; 32

L. J., Ad. 97.

(*r*) 24 Vict. c. 10, s. 6.

according to the original order (*s*); and it is said to be immaterial as against the holder whether his admission of title were oral or written (*t*).

**1406.** If the goods be in the possession of the Crown until the payment of duties, a claim made on behalf of the consignor before the sale of the goods for payment of the duties will bind the surplus proceeds of the sale (*u*).

**1407.** If the vendor have heard of the insolvency of the purchaser before the delivery of the goods to a middleman, the question will arise whether the vendor may refuse to deliver the goods.

It was laid down by Bayley, J. (*x*), that if (as the law is) the vendor, by virtue of his original ownership, and by reason of the defeasible nature of the vendee's right of possession, may stop the goods after they have been despatched, à fortiori he may detain them when he has not parted with the possession. It was also considered by Lord Abinger, C. B. (*y*), that this right followed from the vendor's right to stop in transitu. He observed that it could not be that the vendor must start the goods upon their transit that he might have a right to bring them back; that the reason of the right to stop is that the vendor is not bound to deliver; and that the right to stop proves à fortiori a right to refuse to part with possession. It was however held by the majority of the court in a case (*z*), in which the agreement was that the purchaser should send a vessel for the goods,—which he did, but, afterwards and before they were shipped, became bankrupt,—that the vendor could not refuse to load the ship, and that he broke his contract by so refusing; because the assignees of the bankrupt

(*s*) *Gosling v. Birnie*, 7 Bing. 339; *Stonard v. Dunkin*, 2 Camp. 344; *Hawes v. Watson*, 2 B. & C. 540; 4 D. & R. 22; *Ry. & M.* 6; *Mills v. Ball*, 2 B. & P. 457; *Hawkes v. Dunn*, 1 Cr. & J. 519; *Knights v. Wiffen*, L. R., 5 Q. B. 660.

(*t*) *Gosling v. Birnie*, supra; per Bosanquet, J.

(*u*) *Northey v. Lewis*, 2 Esp. 613.

(*x*) In *Bloxam v. Sanders*, 4 B. & C. 948.

(*y*) *Gibson v. Carruthers*, 8 M. & W. 321.

(*z*) *Ib.*

had a right of election whether they would perform the contract, but the vendor had none, and the assignees were not bound by the contract to pay the price until the arrival of the cargo and the delivery of the bill of lading, a period which had not arrived.

The correctness of this reasoning may be doubted. It is the vendee, who by his insolvency has been the first to break the contract; and as upon his insolvency the vendor may stop in transitu, because the vendee can no longer perform the contract by paying the price, he ought by the same rule to be entitled to refuse to deliver the goods. If the assignees be entitled to have the contract carried out while the goods are still at home, they are equally so when the goods are in transitu.

But so far as regards the time of payment the contract is varied by the insolvency; the right of the assignees in this respect is no longer to receive the goods upon payment at the time fixed by the contract, for otherwise the vendor must again give up the goods, and the stoppage would be ineffectual. How can a different principle be applied where he has not sent the goods at all?

It was, however, intimated that the same circumstances which would justify a vendor in stopping the goods in transitu will also warrant him in detaining them before the transit has commenced, where it only remains to deliver them to the purchaser.

*Of the Loss of the Benefit of the Security by Negligence and Fraud.*

**1408.** Both in legal and equitable mortgages the possession of the title deeds is of great importance as regards priority; and may alone be a sufficient test of right, where by simultaneous mortgages the legal estate passes to several mortgagees (*a*), or where the equities between the incumbrancers are equal. A legal or equitable mortgagee may lose his priority, if he fail to obtain or inquire for (*b*), or, if having obtained, he

(*a*) *Hopgood v. Ernest*, 3 De G., J. & S. 116; 13 W. R. 1004.

(*b*) *Rice v. Rice*, 2 Drew. 73; *Layard v. Maud*, L. R., 4 Eq. 397.

give up without good reason, the possession of the title deeds ; because by the mortgagor's possession of the deeds, which are the evidences of title to the land, the subsequent lender is led to believe, that the estate to which they belong is free from charge ; although at law the rightful owner of the land may recover the deeds in trover from a person who has lent money on them without notice of a want of title in the depositor, notwithstanding negligence on the part of the owner, provided it do not amount to fraud(*c*). It appears to have been formerly thought by common law judges(*d*), that the fact that the mortgagor had been able by possession of the deeds to effect another security, was alone sufficient in courts of equity to postpone a prior mortgagee ; but in a case (*e*) decided in equity before this doctrine was set up, and in which the first mortgagee had trusted to the word of the mortgagor, who said that the deeds were in the country, but should be given him, the first mortgagee did not lose his priority ; though, because he had been negligent, the court would not deprive the other of the deeds. And, at the present day, direct fraud, or gross and wilful neglect, amounting to evidence of fraud, must be proved against a mortgagee, by him who seeks to disturb his priority (*f*).

**1409.** Where the mortgagee has not obtained the deeds, if it be also shown that he has not inquired for them (*g*), or at all investigated the title (*h*), under such circumstances as to lead to an inference that he neglected to do so, lest he should get notice of a defect in his title, the very knowledge which he has attempted to ignore, will be imputed to him ; and the inference thus arising will be strengthened, if the mortgagee be aware that persons in the situation of the mortgagor are accustomed to raise money on deposit of their title deeds (907). In the

(*c*) *Harrington v. Price*, 3 B. & Ad. - Jur. 1097; *Bailey v. Fermor*, 9 Price, 170. 262; *Ratcliffe v. Barnard*, L. R., 6 Ch. 652.

(*d*) *Burnet, J.*, in *Ryal v. Rolle*, 1 Att. 165; *Buller, J.*, in *Goodtitle v. Morgan*, 1 T. R. 755, 762.

(*e*) *Head v. Egerton*, 3 P. Wms. 280.

(*f*) *Evans v. Bicknell*, 6 Ves. 173; *Hewitt v. Loosemore*, 9 Hare, 449; 15

(*g*) *Hewitt v. Loosemore*, *supra*; see *Wiseman v. Westland*, 1 Y. & J. 117; *Mayfield v. Burton*, L. R., 17 Eq. 15.

(*h*) *Worthington v. Morgan*, 16 Sim. 547.



case of a mortgage of copyholds (*i*), the surrenderee not having inquired for the deeds which were in deposit, was postponed, though he had ascertained that there were no incumbrances entered on the rolls. But priority will not be forfeited by the neglect of the mortgagee, or his solicitor, to obtain or inquire for an instrument recited in a deed of remote date which forms the root of the title, if there were no wilful neglect on the mortgagee's part, though his solicitor, being also the agent of the mortgagor, knew that by means of such instrument the mortgagor could raise money (*k*).

Less doubt will of course be felt, where the parties have been guilty of positive fraud (*l*),—as by antedating the legal mortgage that it might not appear to be made on the eve of the mortgagor's bankruptcy; and falsely reciting, that it related to a present advance; and if the subsequent mortgagee, knowing of the prior deposit of the deeds, made no inquiry as to the object of that deposit.

**1410.** But if the mortgagee have not neglected to inquire for the deeds, but have failed to obtain them through the deceit or neglect of the mortgagor,—as if the latter assure him that he has delivered him all the deeds (*m*), or that he will shortly do so (*n*), making a reasonable excuse for not doing it at the moment, it has been determined that the mortgagee, whether his security be legal or equitable, and even though the relation of solicitor and client subsisted between him and the borrower, will not be postponed to a person, who, by reason of the mortgagor's possession of the deeds, has been induced to purchase or lend money on the security of the property. So if upon making proper inquiry respecting a deed, of the existence of which he has notice, a reasonable excuse is made for its non-production,

(*i*) *Whitbread v. Jordan*, 1 Y. & C. 303.

(*k*) *Finch v. Shaw*, *Colyer v. Finch*, 18 Jur. 935; 19 Beav. 500; 3 Jur., N. S. 25; 5 H. L. C. 928. See *Hunter v. Walters*, L. R., 7 Ch. 75.

(*l*) *Birch v. Ellames*, 2 Anst. 427.

(*m*) *Penner v. Jemmett*, 2 Bro. C. C. 652, n.; 1 Fonbl. Eq. 166, n.; *Roberts*

*v. Croft*, 2 De G. & J. 1; 3 Jur., N. S. 1069; 24 Beav. 223; *Hunt v. Elmes*, 28 Beav. 631; 7 Jur., N. S. 200; 2 De G., F. & J. 578; *Dixon v. Muckleston*, L. R., 8 Ch. 155.

(*n*) *Hewitt v. Loosemore*, 9 Harc. 449; *Espin v. Pemberton*, 4 Drew. 333; 3 De G. & J. 547; 5 Jur., N. S. 55, 157.

and the mortgagee is assured and believes, that it does not affect the estate in which he is interested (*o*). In some cases, also, the mortgagor himself may be either not entitled to the sole possession of the deeds, or may be bound to retain them in his own custody. The first is the case of tenants in common and joint tenants, the other may be in cases where the estate is in trust,—as where, although the deeds were in the hands of a *cestui que trust*, the estate was vested in the trustees, and was subject to a term for securing a jointure and portions (*p*), or the case may be such that the possession of the deeds is not legally incident to the estate of the mortgagee, as where he is reversioner and the deeds are held by the tenant for life (*q*), or where (*r*) the security was made by trustees in part execution of a trust to raise a larger sum, and for other purposes, for which possession of the deeds was absolutely necessary; so that without a breach of trust they could not have parted with them. In none of these cases can the legal mortgagee be blamed for not obtaining possession of the deeds.

**1411.** But even if the deeds are forthcoming to the legal mortgagee through the delay of the persons rightfully entitled to take possession of them, those persons will not, it seems, be postponed to the mortgagee, if he, by inquiry, could have ascertained that they were in wrong hands. Therefore where assignees omitted for a long period to take possession of their insolvent's copyhold, and caused no entry of the assignment or copy of the appointment of the assignee to be entered on the

(*o*) *Jones v. Smith*, 1 Ph. 244. The same has been held (*Frazer v. Jones*, 5 Hare, 481, and 17 L. J., Ch., N. S. 353) where no inquiry had been made; but in that case, there having been a false recital in the mortgage, of a prior equitable charge by deposit of a deed, none such having ever been made, the decision went on the ground, that subject to the alleged charge if it had existed, and in fact as it did not exist, the whole of the mortgagor's interest in the equity of redemption (which was the subject of the security) was vested

in the present mortgagee, and the mortgagor had nothing which in equity he could transfer to the subsequent deposittee. It was also (on appeal) partly decided on the ground of fraud in the latter person.

(*p*) 1 Fonbl. Eq. 166, n.; per Lord Eldon, 6 Ves. 190; *Farrow v. Rees*, 4 Beav. 18. See *Cottam v. Eastern Counties Railway Company*, 6 Jur., N. S. 1367.

(*q*) *Tourle v. Rand*, 2 Bro. C. C. 649.

(*r*) *Harper v. Faulder*, 4 Mad. 129.

rolls, but out of compassion left the insolvent in possession of the property, and of the copies of court roll, and he made a conditional surrender; the assignees were not postponed (*s*); on the ground, that the mortgagee might have searched the list of insolvent debtors, and that the statutes directing the entries on the rolls were directory only. By this case the doctrine in favour of the prior incumbrances was perhaps carried to its full extent against a person, who, after a period of nineteen years from an insolvency, found the insolvent in full possession and the apparent owner of the estate. And it may even be doubted, if the compassion of the assignees to the insolvent was not gross neglect towards the rest of the world; especially as they might have made the necessary entry on the rolls, and have still left the insolvent in possession of the estate. It shows, however, the necessity of careful inquiry on the part of mortgagees.

**1412.** In the case usually cited (*t*) as laying down the rule that fraud or gross negligence only, in leaving the deeds, will touch the priority of the legal mortgagee, the judgment has been, perhaps, more generally applied than was intended. The learned judge (Eyre, C. B.), laid great stress upon the distinction existing in fact, but not recognized in law (*u*), between a mortgagee actually lending money on a security, and one who takes a security for a pre-existing debt, as it happened in that case. And it is obvious that fraud may, with far more justice, be imputed to a mortgagee, who, not being compelled to lend his money till he has examined the title, and obtained the deeds, refuses to do either, than to him who seizes the security as a plank to save a debt which is in jeopardy, and takes the conveyance, trusting that he may afterwards get the deeds also. But the rule is now well established independently of this case.

**1413.** The same principles apply in cases in which the mortgagee has had, but has afterwards given up, the possession of the title deeds. If, under the circumstances, it can be

(*s*) *Cole v. Coles*, 6 Hare, 517; see also *Horlock v. Priestly*, 2 Sim. 75.  
(*t*) *Plumb v. Flutt*, 2 Anst. 432.

(*u*) But see *Baillie v. M'Kewan*, 35 Beav. 177.

inferred that he did it fraudulently, or if gross negligence can be imputed to him, as, for instance, if he deliver the deeds to enable the mortgagor to make a limited security, which by consent of the original mortgagee shall take precedence of his own, and a larger sum be raised, trusting the mortgagor to disclose the prior security, the mortgagee (*x*) will be postponed in favour of the incumbrancer, who, by his conduct, has been induced to advance money on the estate; but if the deeds come to the mortgagor's hands without fraud or neglect by the mortgagee; as, for instance, by the wrongful act of a third person to whom he had properly delivered them (*y*), or through misrepresentation on the part of the mortgagor,—as that he wanted the deeds to enable him to grant a building lease (*z*) advantageous to the estate, or to show the lease to an intended purchaser (*a*), that he might ascertain the nature of the covenants, after which it should be returned,—the legal mortgagee's priority will be saved, provided he be diligent in regaining possession of the deeds according to the mortgagor's representation; for if he neglect to demand them, or otherwise acquiesce in the loss of possession, he will be postponed as if the deeds had been at first given up improperly; and this conclusion was strengthened where the prior mortgagee claimed by transfer from the original mortgagee, and having been his solicitor at the time of the transaction, had given up the deeds without his consent (*b*). Nor will the prior mortgagee be postponed, where it cannot be discovered by what means the deeds came back into the mortgagor's possession,

(*x*) *Perry Herrick v. Attwood*, 25 Beav. 216; 2 De G. & J. 21; 3 Jur., N. S. 995; 4 id. 101; *Briggs v. Jones*, L. R., 10 Eq. 92. It seems to have been considered that the first case was not one of negligence; but the precautions which should have been taken are so obvious that it is difficult to find any more appropriate term. The courts have allowed so many excuses, both for the giving up of deeds and for accepting any statements which the borrower chooses to make about them, that it is easier for mortgagors

to defraud subsequent lenders, than for the latter to protect themselves by ordinary vigilance. The mortgagee, in such a case, cannot bring trover for the deeds for want of the right of possession. (*Owen v. Knight*, 5 Sc. 307.)

(*y*) *Meux, Exp.*, 1 Gl. & J. 116.

(*z*) *Peter v. Russell*, 2 Vern. 726; 1 Eq. Ca. Abr. 321.

(*a*) *Martinez v. Cooper*, 2 Russ. 198.

(*b*) *Waldron v. Sloper*, 1 Drew. 193; *Dowle v. Saunders*, 2 H. & M. 242; 10 Jur., N. S. 901.

provided there be nothing to show that the prior mortgagee enabled the mortgagor to commit the fraud; the mere possession of the deeds by the latter, without evidence that they were obtained through the negligence or fraud of the mortgagee, being insufficient to postpone him (*c*).

**1414.** So if a vendor or mortgagee allows the purchase or mortgage money or part of it to remain unpaid, but nevertheless executes and delivers the conveyance with a receipt indorsed, either for the avowed purpose of enabling a security to be made to another incumbrancer, or under circumstances which enable another, *bonâ fide* and without notice, to acquire a security, the holder of the latter security, though it be but equitable, will have priority, whether the mortgage be made for money then advanced or for a debt already due (*d*): and even, it has been held, where the conveyance was executed on the promise of one only of several joint mortgagees, who thereby obtained a security, that the vendor should first be paid out of the purchase-money (*e*). But a conveyance or release so obtained cannot be used in favour of one who has not complied with the agreement on the faith of which it was made, or of any other person having no better equity than he (*f*).

And where a person entitled to an estate subject to charges was enabled to make an equitable security, by producing receipts for the charges which the owners of the charges had signed upon a *bonâ fide* agreement for a mortgage security, they, having been guilty of no fraud and being prior in time, were preferred to a subsequent equitable mortgagee (*g*).

If the solicitor of an intended transferee of a mortgage, being himself one of the transferors, prepare and execute a transfer, and receive the money, but all the transferors do

(*c*) *Allen v. Knight*, 5 Hare, 272; on app. 11 Jur. 527; *Carter v. Carter*, 3 K. & J. 617; 4 Jur., N. S. 63. But see *Pilcher v. Rawlins*, L. R., 7 Ch. 268.

(*d*) *Rice v. Rice*, 2 Drew. 73; *Hunter v. Walters*, L. R., 11 Eq. 292; 7

Ch. 75.

(*e*) *Smith v. Evans*, 28 Beav. 59; 6 Jur., N. S. 388.

(*f*) *Hatchell v. Cremorne*, Ll. & G. t. Plunkett, 236.

(*g*) *Beckett v. Cordley*, 1 Bro. C. C. 353.

not execute the deed or sign the receipt, the money is in the solicitor's hands as his client's money, and not as mortgagee ; and if he misapply it his client will be the loser, though he have received interest from the mortgagor, as if the transfer had been completed (*h*).

**1415.** Where a mortgagee by transfer (from his own solicitor, who was the original mortgagee in possession) handed the deeds to the solicitor, who also acted for the mortgagor, that an abstract might be made for an intended purchaser, but did not give him the deed of transfer to himself, whereby the solicitor was enabled to sell the estate under the original mortgage, without notice of the transfer, and to receive and misapply the purchase-money: it was held (*i*) that the transferee should not be postponed if it could be shown that he had not authorized and had no notice of the payment of the purchase-money to the solicitor, to ascertain which, an issue was directed. And his keeping back the deed of transfer was treated as a natural precaution on the part of the transferee, and not as the result of any fraudulent motive.

**1416.** On the other hand, it will be no excuse for the prior mortgagee, that another induced him to commit a fraud, though he himself be morally innocent of it. As where the first mortgagee was induced by his solicitor to assign to another without consideration a prior mortgage, which had been executed but not acted on (*k*). The deed in this case being valid on the face of it, and no proceedings having been taken to set it aside, was held good.

**1417.** In order to affect a mortgagee with the consequences of the fraudulent act of his agent, it must be shown that at the period at which the act was done, the relation of solicitor and client subsisted ; it not being sufficient that it subsisted at a former period. Hence, a mortgagee will not be postponed to a subsequent purchaser, by reason that the solicitor whom

(*h*) *Griffin v. Clowes*, 20 Beav. 61.

(*k*) *Hiorns v. Holtom*, 16 Beav. 259.

(*i*) *Stevens v. Stevens*, 2 Coll. 20.

he employed about the mortgage, and who also acted in the transaction for the mortgagor, assisted the latter in making the sale without notice of the mortgage; and the relation of solicitor and client is not preserved by payment of interest on the mortgage through the hands of the solicitor. In making such payments the solicitor generally acts as the agent of the mortgagor (*l*) (1284).

It will be no argument in favour of a second mortgagee, seeking in such cases as these to displace the priority of the first, that the former mortgage was an improper investment of trust money, and consequently a breach of trust (*m*).

1418. There are also many cases of loss of priority which illustrate the rule recognized both at law and in equity, that where one by his words or conduct wilfully causes another to believe and act upon a certain state of things, so as to alter his own position, the former cannot aver against him the existence of a different state of things (*n*). Hence, where it can be shown that through the fraud or gross neglect of a prior incumbrancer, or his agent (*o*), another person has been induced to lend money on the same estate, the prior incumbrancer will be postponed; as where the prior incumbrancer, when informed that another security was in contemplation (*p*), denied or was silent as to his own charge on the estate—where the prior mortgagee advised (*q*) the other, as his counsel, to complete the loan, and himself prepared the deed with a covenant that the estate was free from incumbrances—where the prior mortgagee engrossed (*r*) the second mortgage; and it was even held, where he only witnessed it (*s*), (though the principle of

(*l*) *Finch v. Shaw*, *Colyer v. Finch*, 18 Jur. 935; 19 Beav. 500; 5 H. L. C. 928; 3 Jur., N. S. 25.

(*m*) *Allen v. Knight*, 5 Hare, 272.

(*n*) Per Lord Denman in *Pickard v. Sears*, 6 Ad. & El. 469; see *Hooper v. Gumm*, L. R., 2 Ch. 282.

(*o*) *Brown v. Thorpe*, 11 L. J., N. S., Ch. 73.

(*p*) *Cannock v. Jauncey*, 27 L. J., N. S., Ch. 57; *Commissioners of Public Works v. Harby*, 23 Beav. 508; *Ibbott-*

*son v. Rhodes*, 2 Vern. 554. An issue was directed on appeal to try whether this information was given. (*Upton v. Vanner*, 8 Jur., N. S. 405.)

(*q*) *Draper v. Borlace*, 2 Vern. 370; and see *Brown v. Thorpe*, *supra*.

(*r*) Cited 1 Bro. C. C. 357.

(*s*) *Mocatta v. Murgatroyd*, 1 P. Wms. 393. On the principle "that it would be presumed that every witness that could write or read was acquainted with the substance of the deed or

this decision was afterwards overruled (*t*), because a witness in practice is not privy to the contents of a deed), and the same was held, where an incumbrancer, being present during a treaty for settlement of the estate on a marriage, fraudulently concealed his mortgage from the person to be benefited, and agreed with the settlor to accept his personal security (*u*). And where a person entitled to charges upon an estate, of which she was also the devisee in trust, joined as devisee in trust and executrix, with the owner of the estate, in a mortgage without referring to her own charges (*x*). But a mortgagee need not go out of his way to give notice of his security upon hearing that the mortgagor is dealing with the estate (*y*).

The same equity was applied (*z*) against the representatives of a mortgagor, to make good his assertion to a purchaser of the estate, that part of the mortgage debt had by agreement with the mortgagee been transferred to other property, in exoneration of that agreed to be sold. The mortgagee having repudiated the alleged agreement, and having obtained payment of the whole debt from the purchaser, the latter was allowed to come upon the property alleged to have been substituted, for the difference. And where the loan has been made on the faith of a false representation by a stranger, the stranger may be compelled to make good the loss, though no fraud was intended (*a*).

But the person who has stood by, or allowed the subsequent security, must have been aware of his own rights; for it is his personal misconduct which binds him, and this does not exist if he be ignorant of his rights (*b*).

#### 1419. The circumstance that an incumbrancer has wilfully

instrument which he, having attested it, undertook to support with his evidence."

(*t*) 1 Bro. C. C. 357; *Watts v. Cresswell*, 9 Vin. Abr. 415, pl. 24; *Barret v. Wells*, Pre. Ch. 131.

(*u*) *Berrisford v. Milward*, 2 Atk. 49; *Barn. Ch.* 101.

(*x*) *Strong v. Hawkes*, 4 De G., M. & G. 186; 4 De G. & J. 632. And see

*Commissioners of Public Works v. Harby*, 23 Beav. 508; 3 Jur., N. S. 478.

(*y*) *Osborn v. Lea*, 9 Mod. 97.

(*z*) *A.-G. v. Cox*, 3 H. L. C. 240.

(*a*) *Slim v. Croucher*, 2 Gif. 37; 6 Jur., N. S. 190, 437; 1 De G., F. & J. 518.

(*b*) *Cockell v. Taylor*, 15 Beav. 103.



obstructed a creditor, in carrying on proceedings upon the completion of which he would have been entitled to a charging order, has been held not to deprive the former of the benefit of his securities (*c*).

**1420.** The case of a bankrupt, who is suffered by his creditors to carry on business, and to receive the profits without first obtaining his certificate, falls within the principle, that if a man having a lien stand by during the making of a new security, he shall be postponed; and the former creditors will be postponed to those who are subsequent to the bankruptcy (*d*). And notice of the fact that the bankrupt is so carrying on business will be imputed to the former creditors, if it appear that the bankrupt have paid off some of them, and that one of those paid was an assignee under the bankruptcy (*e*).

So if the vendor of an estate, having notice that it was bought with trust money, leave part of the price under the absolute control of one of the trustees, without the concurrence of the others, or of the *cestuis que trust*, he cannot, as against the other trustees or the *cestuis que trust*, claim a lien on the estate for the unpaid part of the purchase-money (*f*).

**1421.** The directors or other officers of a joint stock company, who neglect to comply with the enactment which requires mortgages and charges upon the property of the company to be registered, cannot set up their unregistered securities against the general creditors of the company (*g*). But shareholders or others, having unregistered securities, are not affected by the neglect of the officers of the company to effect the registration (*h*).

**1422.** An incumbrancer will not lose his priority by omitting

(*c*) *Shaw v. Neale*, 20 Beav. 157; 6 H. L. C. 581.

(*d*) *Tucker v. Hernamann*, 4 De G., Mac. & G. 395; *Troughton v. Gitley*, Ambl. 630.

(*e*) *Tucker v. Hernamann*, *supra*.

(*f*) *White v. Wakefield*, 7 Sim. 401.

(*g*) *Patent Bread Machinery Co.*, Re, L. R., 7 Eq. 289; *Wynn Hall Coal Co.*, Re, L. R., 10 Eq. 615; *Native Iron Ore Co.*, Re, L. R., 2 Ch. Div. 345.

(*h*) *General Provident Assurance Co.*, L. R., 14 Eq. 507; *General South American Co.*, L. R., 2 Ch. Div. 337.

to make advances necessary for the recovery of the fund which is the subject of the security, and to answer or notice communications by the mortgagor's agent informing him of the necessity for such advances; unless distinct notice be given, that if no advances be made a new charge will be created; especially if the subsequent incumbrancer have taken the security without inquiry into the prior rights (*i*). But the first incumbrancer will not be allowed the benefit of advances made by the other, without paying him the amount of his advances with interest (*h*).

**1423.** Where a person advanced part of the purchase-money of an estate to an intended purchaser, who was, but not to the lender's knowledge, an uncertificated bankrupt, and paid the amount to the vendor, who executed the conveyance to the purchaser and delivered the title deeds to the lender; and the purchaser afterwards gave the latter a memorandum of deposit, the whole being one transaction; the lender acquired a lien on the deeds as against the purchaser's assignees; for though in general an uncertificated bankrupt can only acquire property for the benefit of his assignees, and can therefore have no right to charge it as against them, yet here the estate was conveyed by the vendor on the undertaking of the lender to advance the money, and the conveyance, to the extent of the advance, was in fact made for his benefit (*l*).

**1424.** Coverture being no excuse for fraud, a wife, who fraudulently enables her husband to raise money on her estate, shall be postponed to the mortgagee (*m*). And if a married woman, representing herself to be single, execute a mortgage in that character, the court, as against her, if she survive her husband, and as against her heir or other person claiming only as a volunteer through her, if she do not survive her husband, will give the mortgagee a specific charge, as an equitable mort-

(*i*) *Myers v. United Guarantee and Life Assurance Company*, 1 Jur., N. S. 883; 3 Eq. R. 579; 7 De G., M. & G. 121.

(*h*) *Id.*

(*l*) *Meux v. Smith*, 11 Sim. 410; 2 M., D. & De G. 789.

(*m*) *Evans v. Bicknell*, 6 Ves. 181; *Sharpe v. Foy*, L. R., 4 Ch. 35.

gagee, upon the property upon which he was induced, by the fraud, to lend his money (*n*).

And so of an infant, if he be old and cunning enough to carry out a fraud, he shall make satisfaction. Therefore, if an infant remainderman, being almost of full age, be active in persuading a mortgagee to lend money on the security of a mortgage in fee, knowing the mortgagor to be but tenant for life, he shall not afterwards claim as remainderman against the mortgagee (*o*). This principle, however, will not support a security made by an infant and accepted upon a false declaration that he was of full age, against a subsequent mortgage, made after he attained full age, to a mortgagee without notice (*p*).

*Of the Loss or Destruction of the Subject of the Security.*

**1425.** The benefit of a security may be lost by the destruction or loss of the property of which it is the subject (*q*).

When the security is upon a ship which is captured by an enemy, it is lost, even though the person entitled to the benefit of it be a neutral, and though the debt were contracted in time of peace. The captors seize the gross tangible property without regard to any claims upon it as between the owners and other persons, whether by way of mortgage (*r*), bottomry (*s*), or lien (*t*), for purchase-money or on any other account; and, on the other hand, where the property is protected from capture, the intending captors can derive no benefit from their enemies' ownership of such interests. The court neither recognizes in favour of a neutral his lien on an enemy's ship, nor against him the lien of an enemy upon the neutral ship (*u*).

But nothing short of an actual total loss will discharge the condition of a bottomry bond. As long as the ship exists in

(*n*) *Vaughan v. Vanderstegen*, 2 Drew. 363, 379.

(*o*) *Watts v. Cresswell*, 9 Vin. Abr. 415, pl. 24; 2 Eq. Ca. Abr. 516; and see *Cory v. Gertcken*, 2 Mad. 40; and *Clare v. Bedford*, 13 Vin. Abr. 536-7: and note, that in the principal case defendant was said to have been privy to a further advance after he came of age.

(*p*) *Inman v. Inman*, L. R., 15 Eq. 260; and see the Infants Relief Act, 1874, c. 62.

(*q*) *Story*, Bailm. § 363.

(*r*) *Aina*, 18 Jur. 681.

(*s*) *Tobago*, 5 C. Rob. 218.

(*t*) *Marianna*, 6 C. Rob. 24; *Ida*, 18 Jur. 752.

(*u*) *Sorensen v. The Queen*, 11 Mo. P. C. 119.

the hands of the owner, whatever may be the extent of her damage, or if having been captured by an enemy, she be retaken, there is no total loss or destruction for this purpose (*v*), even though the damage be such that, as between insurers and insured, it would have amounted constructively to a total loss (*x*). And the lien for freight upon a captured ship will also revive upon her recapture (*y*). And if she be sold in a foreign port, although without express notice of the bond, the purchaser will take subject to it (*z*). The same rule applies where the ship is subject to a lien for damage (*a*).

**1426.** The right of the owner of property generally, and therefore of one who has a pledge or other security thereon, is not destroyed by the mere transmutation of its subject-matter into a different form without his assent (*b*).

(*v*) *Thompson v. Royal Exchange Assurance*, 1 M. & S. 30; *Joyce v. Williamson*, 3 Dougl. 164; *Broomfield v. Southern Insurance Company*, L. R., 5 Exch. 192; *Elephanta*, 15 Jur. 1185.

(*x*) *Great Pacific*, L. R., 2 P. C. 516.

(*y*) *Cheesman, Exp.*, 2 Eden, 181.

(*z*) *Catherine*, 15 Jur. 231.

(*a*) *Charles Amelia*, L. R., 2 A. & E. 330.

(*b*) *Story*, Bailm. § 363; *Story*, Agency, § 231; citing *Taylor v. Plumer*, 3 M. & S. 562; *Lane v. Dighton*, Ambl. 409; *Lord Chedworth v. Edwards*, 8 Ves. 46; *Whitecombe v. Jacob*, 1 Salk. 160, and other cases of trust and agency.

## CHAPTER X.

OF THE PERSONS INTERESTED IN AND WHO  
ARE NECESSARY OR PROPER PARTIES TO  
SUITS CONCERNING SECURITIES.*Of the Persons interested in the Equity of Redemption.***1428.** *Of the Mortgagor.***1433.** *Of the Trustee in Bankruptcy of the Mortgagor.***1434.** *Of the Assignees of the Equity of Redemption.***1443.** *Of the Devisee and Heir of the Mortgagor.***1446.** *Of the Personal Representative of the Mortgagor.**Of the Persons interested in the Security and Debt.***1455.** *Of the Mortgagee.***1462.** *Of the Assignees and Devisees of the Security and Debt.***1465.** *Of the Heir of the Mortgagee.***1466.** *Of the Personal Representative of the Mortgagee.***1467.** *Of the Persons beneficially interested either in the Equity of Redemption or in the Security and Debt.***1476.** *Of Assignees pendente lite of the Mortgagor and Mortgagee.*

**1427.** SUBJECT to certain exceptions created by statute and orders of court (**1467**), the general rule in equity concerning parties to suits is, that all persons who have an interest apparent on the record in the object of the suit are necessary parties, and no person ought to be made a party who has not such an apparent interest (*a*).

Now the interests of parties to suits relating to incumbered property arise either out of some right in the equity of redemption of the incumbered estate, or in the estate itself and the debt secured upon it in the hands of the mortgagee; and as a general rule all persons who have an interest either in the right of redemption or in the security must be joined, though the result may be the trial of a legal right between parties thus brought before the court for a different purpose (*b*).

*(a)* Calvert on Parties, 13, 91.

geon v. Collier; where, on a bill to redeem, it became necessary to decide

*(b)* Evans v. Jones, Kay, 39; Spur-

*Of the Persons interested in the Equity of Redemption.**Of the Mortgagor.*

**1428.** And, first, as to the mortgagor himself. He, or the owner for the time being of the whole or any share of the equity of redemption (including, it has been held, his trustee to bar dower, whose estate is vested (*c*)), must be present in every suit in which the question of redemption arises between mortgagees; because, after giving liberty to the *puisé* mortgagee to redeem the first, the decree is, that the former in his turn may be redeemed by the mortgagor; in default of which the latter shall be foreclosed (**1665**). But if he be no party to the suit, his right of redemption will remain open, and the first mortgagee will be exposed to another suit (*d*). The mortgagor, however, need not be joined in a redemption or foreclosure suit between the mortgagee and his derivative or sub-mortgagee (*e*).

**1429.** The presence of the owner of the equity of redemption is also necessary, where part of the estate, which is subject to the first mortgage, is not comprised in the security of the second mortgagee, and even where the equity of redemption of the excluded part is no longer in the hands of the original mortgagor (*f*). For the prior mortgagee must be redeemed entirely, or not at all (**1170, 1033**); and the subsequent mortgagee of part of the estate, upon paying off the whole debt, steps into the place of the other as mortgagee of the whole estate, and thereby of necessity acquires the right, and incurs the obligation, of bringing the owners of that estate before the court. It is also incumbent on the mortgagee, where the estate has been sold in lots, to proceed against all the purchasers (*g*).

as to the voluntary character of a post-nuptial settlement; 1 Eden, 55. See *Audsley v. Horn*, 26 Beav. 195.

(*c*) *Horrocks v. Ledsam*, 2 Coll. 208.

(*d*) *Fell v. Brown*, 2 Bro. C. C. 276; *Palk v. Clinton*, 12 Ves. 48; and see *Ramsbottom v. Wallis*, Coote, Mort. App. 576; 5 L. J., N. S., Ch. 92;

*Caddick v. Cook*, 9 Jur., N. S. 454; 32 Beav. 70; 32 L. J., N. S., Ch. 769.

(*e*) *Seton*, Dec. 422, ed. 3.

(*f*) *Palk v. Clinton*, 12 Ves. 48. See also *Jones v. Smith*, 2 Ves. jun. 372; and cases there mentioned; and *Thorncroft v. Crockett*, 2 H. L. C. 239.

(*g*) *Peto v. Hammond*, 29 Beav. 91.

The rule is the same, where the mortgagee holds securities upon distinct estates, and even for distinct debts of the mortgagor, whether the securities be by the same or by different instruments, and whether redemption be sought by an incumbrancer, or by the owner of the equity of redemption, of part of the mortgaged estate or of one of the estates separately mortgaged (*h*) (1038).

And the mortgagor of another estate as a collateral security is a necessary party to a suit for foreclosure against the principal mortgagor by virtue of his right to redeem, and thereby to prevent his own estate from being burthened to a greater amount than the estate of his principal is insufficient to satisfy (*i*) (1223). But the surety is not a necessary party, where he is bound by a personal covenant only, unless he have paid off part of the debt (*j*).

The mortgagor must also be a party to a suit in which the validity of the mortgage is contested (*k*).

If the estate of a married woman be mortgaged, and the right of redemption be reserved to her and her husband, or either of them, she must be made a party (*l*).

If tenant for life of a mortgaged estate mortgage his life interest for a term, if he shall so long live, with a power of sale, he is a necessary party to a bill for redemption of the original mortgage brought by a purchaser under the power of sale, notwithstanding the smallness of his interest; because the mortgage term was carved out of his interest in the equity of redemption (*m*).

**1430.** If the mortgagor have conveyed his equity to a subsequent mortgagee, the consideration for the sale being the amount due on the several mortgages, and payment thereof by the purchaser, the balance being applied to the discharge

(*h*) *reson v. Denn*, 2 Cox, 425; *Cholmondeley v. Clinton*, 2 Jac. & W. 134; *Carter, Exp.*, Ambl. 733.

(*i*) *Stokes v. Clendon*, 3 Sw. 150, n.

(*j*) *Newton v. Earl of Egmont*, 4 Sim. 574; *Gedye v. Matson*, 25 Beav. 310.

(*k*) *Thompson v. Baskerville*, 3 Rep. in Ch. 215. And see *Stackhouse v. Countess Jersey*, 7 Jur., N. S. 359; 1 J. & H. 721.

(*l*) *Hill v. Edmonds*, 5 De G. & S. 603.

(*m*) *Hunter v. Maclew*, 5 Hare, 238.

of the purchaser's own debt, and a clear intention be shown that he is to take the estate burthened with the debts, his own debt is destroyed, and he, being in the place of the original mortgagor, may be foreclosed without the presence of the latter (*n*) (1301).

1431. If the mortgagor or owner of the equity of redemption become bankrupt (*o*), he should not generally be made a party; for his whole interest, and therefore his right of redemption, will be bound by a decree against the bankruptcy trustee. And the trustees in bankruptcy or under a deed of assignment under the Bankruptcy Act must be joined, although where the security consists of leasehold property they have not signified their acceptance of the lease (*p*). Charges of fraud, not particularly directed to the matters upon which relief is sought, will not make the mortgagor a less improper party; nor will a general charge against several defendants (of whom he is one) of possession of documents (*q*). Such a charge will be referred to a possession by the defendants according to their rights and interests. And an insolvent, having been made a party, could not appeal, though a right of redemption was given him by the decree, and he alleged that there was in fact a surplus (*r*).

The bankrupt may, however, be properly joined; for the right of redemption becomes revested in him upon the disclaimer of the trustee; and if the disclaimer be after the commencement of the action, the mortgagor will be properly added as a party; and, though he disclaim any interest, cannot get rid of his liability to make discovery (*s*).

But the trustee's disclaimer must be absolute; for if it be coupled with an admission that the bankrupt's estate is vested in them, this admission makes it necessary to bring the trustee

(*n*) *Brown v. Stead*, 5 Sim. 535.

(*o*) *Kerrick v. Saffery*, 7 Sim. 317;  
*Lloyd v. Lander*, 5 Mad. 282.

(*p*) *Jones v. Binns*, 10 Jur., N. S. 119; 33 Beav. 362; *Metropolitan Bank v. Offord, L. R.*, 10 Eq. 398.

(*q*) *Lloyd v. Lander*, 5 Mad. 282;  
see *King v. Martin*, 2 Ves. jun. 641.

(*r*) *Rochfort v. Battersby*, 2 H. L. C. 388; 14 Jur. 229; see *Wearing v. Ellis*, 6 De G., M. & G. 608.

(*s*) *Singleton v. Cox*, 4 Hare, 326;  
*Dobree v. Nicholson*, W. N., 1870, 151.



to the hearing, and then it will be improper to join the bankrupt (*t*).

If the trustee refuse to proceed, and the creditors commence an action for redemption (1245), the bankrupt it seems should be made a party (*u*).

**1432.** If the equity of redemption become vested in the crown by forfeiture, the Attorney-General should be joined (*x*).

*Of the Trustee in Bankruptcy of the Mortgagor.*

**1433.** The trustee, under the bankruptcy of the mortgagor (*y*), is the proper party to suits in respect of his interest, and he will be bound by decrees against the trustee (*z*). But if he absolutely disclaim and state his readiness to have released the equity, and that all the estate has been distributed, he should not be brought to the hearing; otherwise if, by the disclaimer, he admits having an interest in the estate (*a*).

Nor should the trustee be joined in respect of an estate of which the equity of redemption was settled by the mortgagor for valuable consideration before his bankruptcy (*b*).

The assignee of an insolvent grantor of a rent-charge was held to be a necessary party to a bill for a receiver, though the object of the suit was only to affect the possession, and not the title of the estate (*c*).

The trustee is the proper party to a redemption suit commenced by creditors of the bankrupt, in consequence of the refusal of the trustee himself to sue, where the creditors make out a case which entitles them to commence such a suit (*d*) (1245).

Where, under the old practice, the mortgagor's bankruptcy

(*t*) *Collins v. Shirley*, 1 Russ. & M. 638, and 9 Sim. 399.

(*u*) *Franklyn v. Fern*, Barn. 30—32.

(*x*) *Lutwyche v. A.-G.*, cited by Lord Hardwicke, 2 Atk. 223; *Paulet v. A.-G.*, Hard. 465.

(*y*) 32 & 33 Vict. c. 71, s. 25; Bankruptcy Act, 1869; and see s. 17.

(*z*) *Hanson v. Preston*, 3 Y. & C. 229; *Cash v. Belcher*, 1 Hare, 310;

*Peake v. Gibbon*, 2 Russ. & M. 354; *Hill v. Edmonds*, 5 De G. & S. 603.

(*a*) *Thompson v. Kendall*, 9 Sim. 397; *Collins v. Shirley*, 1 Russ. & M. 638; 9 Sim. 399.

(*b*) *Steele v. Maunder*, 1 Coll. 535.

(*c*) *Curtin v. Darcy*, 2 Jo. & Lat. 718.

(*d*) *Franklyn v. Fern*, Barn. 30—32.

was discovered after issue joined, the plaintiff was permitted to withdraw his replication and amend by joining the assignees (*e*); and in such a case the bankrupt has been allowed to be retained (*f*): but the trustee must be joined (*g*).

*Of the Assignees of the Equity of Redemption.*

1434. The application to those cases, in which the right of redemption has become the subject of settlement, of the general rule in equity, that it is sufficient to bring the first tenant in tail before the court, has long been recognized. The rule, established for convenience, is said to be founded upon the practice at law, whereby subsequent remainders might be barred by a recovery in which a subsequent remainderman was vouched, without prejudice to the intermediate remainders. But Courts of Equity have gone further in binding subsequent remainders in tail; and, by extending the rule, have avoided the necessity of giving every contingent remainderman a right to open the accounts, and thereby to render foreclosure all but impossible (*h*) (1481).

It has, therefore, been laid down, that it is enough to bring before the court the first tenant in tail in being; and if there be no tenant in tail in being, the first person entitled to the inheritance; and if no such person then the tenant for life (*i*).

But where there is an express life estate the remaindermen must be joined (*k*).

The tenant for life (*l*), if there be one, and the intermediate remainderman for life (*m*), must be parties; and if the interests of the latter become vested pending the suit, they must be added as parties.

And if by the death, pending the suit, of the owner of the

(*e*) *Hanson v. Preston*, 3 Y. & C. 229.

(*f*) It seems in consequence of some doubt as to the regularity of the bankruptcy.

(*g*) *Wood v. Surr*, 19 Beav. 551.

(*h*) *Lloyd v. Johns*, 9 Ves. 37.

(*i*) *Giffard v. Hort*, 1 Sch. & Lef.

408; *Roscarrick v. Barton*, 1 Ch. Ca. 218; see *Platt v. Sprigg*, 2 Vern. 304.

(*k*) *Sutton v. Stone*, 2 Atk. 101.

(*l*) *Reynoldson v. Perkins*, Amb. 564; see *Handcock v. Shaen*, Colles' P. C. 122.

(*m*) *Chappell v. Rees*, 1 De G., M. & G. 393; *Gore v. Staepoole*, 1 Dow, 31.

first estate of inheritance, that interest be determined, the owner of the next estate of inheritance, and of the interests prior to his, must be joined.

And so must owners of new interests acquired by the determination of a contingency, and which are not subject to destruction by a prior vested estate of inheritance (*n*).

If the tenant for life be made a party with the tenant in tail, and the latter release after the taking of the accounts, and the passing of the time fixed for redemption, a judgment of foreclosure, made absolute against the tenant for life only, will still bind the contingent remainders; the release under such circumstances being equal to an absolute judgment (*o*).

The presence of an infant tenant in tail will bind the inheritance as well as if he were adult (*p*).

But a judgment against the tenant for life only, where the tenant in tail, being out of the jurisdiction, is not made a party, will not bind him; though it seems such a judgment may be had, if the plaintiff will take the risk of being compelled to account again (*q*).

**1435.** Where there are trustees to preserve contingent remainders, however many contingent limitations there may be, it is sufficient to bring the trustees before the court, together with him in whom the first remainder of the inheritance is vested; and all that come after will be bound by the decree, though not *in esse*; unless there be fraud and collusion between the trustees and the first owner of the inheritance (*r*).

**1436.** If there be a mortgage for a term, with a trust for sale of the fee, the trustees, having a legal interest in the estate, are properly joined in the mortgagee's suit for a sale (*s*). But if the trustees have merely the equity of redemption upon trust to sell and pay off the prior mortgage debt, and hold the surplus for the mortgagor, and the deed be without consideration, the

(*n*) Lord Red. 174.

(*o*) Reynoldson v. Perkins, AmbL. 564.

(*p*) Ibid.

(*q*) Fishwick v. Lowe, 1 Cox, 411.

(*r*) Hopkins v. Hopkins, 1 Atk. 590; Cholmondeley v. Clinton, 2 Jac. & W. 133; Pow. Mort. 975, n. (*q*); and Lord Red. 174.

(*s*) Kerrick v. Saffery, 7 Sim. 317.

trustees are not necessary parties to a suit by the mortgagee; because this is only a private arrangement made by the mortgagor for his own convenience, and the trustees are but agents, claiming by an instrument which may at any time be cancelled, and under which the mortgagee takes no interest (*t*).

The trustees of persons entitled beneficially under a settlement of a lease are not necessary parties to a suit for redemption, where the settlor, after the assignment to the trustees, has renewed in his own name, and has thereby acquired the whole legal estate (*u*).

**1437.** Where the mortgagor and mortgagee of leaseholds concur in assigning part of the estate for the residue of the term at a rent, and, apparently, with the intention of making only an underlease, the assignee is not a proper party to a suit for foreclosure in respect of the equity of redemption (*x*), and it was doubted if he were so in respect of the rent reserved.

**1438.** Partners of the mortgagor, who have a right of pre-emption over his mortgaged share, are necessary parties to a suit to foreclose the security (*y*).

**1439.** The first (*z*), or any subsequent (*a*) mortgagee or incumbrancer, whether of a legal (*b*), or equitable (*c*) estate, who files a bill for foreclosure or sale (*d*), must make every incumbrancer, whose security is subsequent to his own, a party to his suit; in order that their successive rights of redemption may be preserved. And if two estates be mortgaged, and the mortgagor afterwards mortgage the equity of redemption of one of them to a second mortgagee, and sell that of the other to a

(*t*) *Slade v. Rigg*, 3 Hare, 35; *Garrard v. Lauderdale*, 3 Sim. 1.

(*u*) *Malone v. Geraghty*, 3 D. & War. 248—261; 1 H. L. C. 81.

(*x*) *Edwards v. Jones*, 1 Coll. 247.

(*y*) *Redmayne v. Forster*, L. R., 2 Eq. 467.

(*z*) *Adams v. Paynter*, 1 Coll. 530; *Tylee v. Webb*, 6 Beav. 552.

(*a*) *Johnson v. Holdsworth*, 1 Sim., N. S. 109.

(*b*) *Adams v. Paynter*, *supra*.

(*c*) *Tylee v. Webb*, *supra*.

(*d*) *Burgess v. Sturges*, 14 Beav. 440; *Ormsby v. Thorpe*, 2 Mol. 503.

third person, the original mortgagee in foreclosing must bring forward both the second mortgagee and the purchaser; for he cannot foreclose either of the estates alone, each being equally liable to the debt. Nor will an allegation without proof, that such a purchaser is an assignee for valuable consideration, without notice of the mortgage, bind the second mortgagee, or deprive him of his right to insist upon the presence of the purchaser (*e*). But it seems it would be otherwise if the allegation were admitted or proved.

In the case of a statutory mortgage of tolls, which passes only a share of the tolls, bearing the same proportion to the whole thereof as the money advanced by the mortgagee bears to the whole of the money borrowed, all the mortgagees, whether prior or subsequent, are necessary parties, inasmuch as one cannot sue for payment of the amount due to him, without diminishing the fund out of which the others are intended to be paid; and he who takes possession must apply the tolls in payment of the interest of all the mortgages *pari passu* (*f*).

**1440.** The rule that subsequent incumbrancers are necessary parties applies to judgment creditors and all other creditors who are entitled to redeem (1243). This was long since said by Lord Alvanley to be the general practice (*g*), but he refused to treat it as indispensable, and it seems not to have been always followed in earlier cases. On the one hand, the joining of all subsequent incumbrancers may cause great expense to them, and both expense and inconvenience to the plaintiff, by giving a dishonest mortgagor the power of shielding off foreclosure by multiplying incumbrances. On the other, a subsequent incumbrancer, who has not been made a party to the suit, may render it useless by commencing a new suit on his own account. Every incumbrancer, too, has a right to be present at the taking of the

(*e*) *Payne v. Compton*, 2 Y. & C. 457.

(*f*) *Mellish v. Brooks*, 3 Beav. 22; *Watts v. Lord Eglinton*, 15 L. J., N. S., Ch. 412.

(*g*) *Bishop of Winchester v. Beavor*,

4 Ves. 314; and see *Greswold v. Marsham*, 2 Ch. Ca. 170; *Bird v. Gandy*, 7 Vin. Abr. 45, pl. 20; 2 Eq. Ca. Abr. 251; *Briscoe v. Kenrick*, 1 L. J., N. S., Ch. 116.

accounts, lest by mistake or collusion (*h*) between the plaintiff and the mortgagor, his interests may suffer. The hardship has been thought to be great upon the prior mortgagee, on the ground that he ought not to be entangled with questions between subsequent mortgagees (*i*); and it has been argued in his favour, that he lent his money upon the expectation, that he might either recover the money or obtain possession of the estate by a suit with the mortgagor alone (*k*). The argument seems to suggest its own answer; for the lender, when he takes his security, knows that his debtor's necessities may lead him to encumber the equity of redemption; and this is simply a part of the mortgagee's risk. The debtor is under no obligation to keep his equity intact for the mortgagee's benefit, and the rights of those to whom it is assigned are entitled to as much attention as his own.

It was accordingly held in an Irish case (*l*), to be at least the right, if not the absolute duty, of the plaintiff to bring all subsequent judgment creditors before the court; and it is also clear, that by the practice in England such creditors must be joined (*m*). But the application of the rule has been much narrowed by the operation of the statute 27 & 28 Vict. c. 112, s. 1, under which no creditor under a judgment, entered up after the passing of the act, will be a necessary party unless he have perfected his judgment by execution (*n*) (154, 1243).

And creditors by judgment in a register county, where the judgment is not registered under the local act, are not necessary parties; for the statute 1 & 2 Vict. c. 110, does not make such a judgment a charge upon the land; its effect being only to make every judgment an equitable charge upon land which before the statute might have been taken under an *elegit* (*o*).

(*h*) See *Graves v. Wright*, cited 1 Dru. & War. 193.

(*i*) *Titley v. Davies*, 15 Vin. Abr. 447, s. 19.

(*k*) *Calvert*, 187.

(*l*) *Rolleston v. Morton*, 1 Dru. & War. 171.

(*m*) *Rolleston v. Morton*, *supra*; and *Adams v. Paynter*, 1 Coll. 530; *Harri-son v. Pennell*, 4 Jur., N. S. 682. The earlier practice in Ireland seems to have

been different. (*Johns v. French*, 1 Hog. 450; *Gordon v. Horsfall*, 5 Moore, 393.) As to the modern practice there, see *Joyce v. Joyce*, 10 Ir. Eq. R. 130.

(*n*) *Earl of Cork v. Russell*, L. R., 13 Eq. 210; *Bailey's Trusts*, Re, cited there; notwithstanding *Mildred v. Austin*, L. R., 8 Eq. 220.

(*o*) *Johnson v. Holdsworth*, 1 Sim. N. S. 106.

And by virtue of an unregistered judgment debt, lands cannot be so taken in a register county (1097).

As the reasons of this rule as to the joining of subsequent incumbrancers were held to apply in principle to creditors by judgment, who by force of the Statute of Westminster had but a general charge upon the lands of the debtor (*p*), it follows that all creditors who have a general charge upon their debtors' lands fall within its provisions.

Judgment creditors of the owner of an estate are not necessary parties to a suit for enforcing a personal equity against the purchaser of an interest in the estate, though the success of the plaintiff may improve their security (*q*).

**1441.** If pending the suit, the plaintiff receive notice of a subsequent incumbrance, he must make the owner thereof a party to bind his rights; and where notice was given before decree, the judgment creditor had liberty to surcharge and falsify. But, where the general rule cannot be acted upon, for want of notice to the plaintiff of the subsequent incumbrances, it may be stated, but (from the imperfect character of the early reports) with caution—

I. That if the plaintiff obtain his judgment without having received notice, the judgment will bind the subsequent incumbrancer, as to the accounts, if taken *bonâ fide*, but not his right of redemption (*r*).

II. Except in case of collusion or other fraud, which will give the subsequent incumbrancer a right to open the accounts also, upon his stating particular errors (1483); but not to unravel them upon general charges of fraud and collusion, if the fraud and collusion be denied (*s*). And the fraudulent or vexatious conduct of the mortgagor, if he should create subse-

(*p*) 3 & 4 Vict. c. 105, s. 22, in Ireland; and 1 & 2 Vict. c. 110, s. 13, in England.

(*q*) Ford v. Tennant, 3 De G., F. & J. 695.

(*r*) Cokes v. Sherman, Freem. Ch. 14; and semble in Lomax v. Hide, 2 Vern. 185; and Godfrey v. Chadwell,

2 Vern. 601. But Morret v. Westerne, id. 663, seems contra as to accounts. In Greswold v. Marsham, 2 Ch. Ca. 170, a judgment creditor was held to be bound, because he had not given notice of his incumbrance.

(*s*) Needler v. Deeble, 1 Ch. Ca. 299; Cokes v. Sherman, 2 Freem. 14.

quent incumbrances with the view of shielding himself from foreclosure, will excuse the mortgagee from making the owners of such securities parties to the suit (*t*).

**1442.** But where creditors interested under a bond made to a trustee for the creditors, and upon which judgment had been entered up, sued the trustee for an account under the deed, and at the same time prayed for leave to redeem a mortgage prior, and to postpone one subsequent to the judgment (*u*), the bill was dismissed with costs against the subsequent mortgagee as an unnecessary party, the judgment having a legal priority. Considering the subsequent decisions, and the right of the first mortgagee to have the accounts taken against him once for all, it is not probable that this case would now be followed. It seems that postponement only was the object of joining the subsequent mortgagee, but the principle to be attended to is, that the suit made it necessary for the first mortgagee to account.

*Of the Devisee and Heir of the Mortgagor.*

**1443.** The devisee, whether in trust (*x*) or beneficially, of the mortgagor is a necessary party in respect of so much of the equity of redemption as has been devised to him; and the heir (*y*), in respect of what he takes by descent. But if the whole equity be devised, the heir having no interest is not a proper party, either to a suit by the devisee to redeem (*z*) or by the mortgagee to foreclose (*a*). Nor should he be made a party to a suit by a devisee of the grantor in a fraudulent conveyance, to set it aside (*b*), because the equity of setting aside such a deed will pass by devise. But it may happen

(*t*) *Yates v. Hambly*, 2 Atk. 237; and see *Smith v. Chichester*, 2 Dru. & War. 404.

(*u*) *Shepherd v. Gwinnet*, 3 Sw. 151, n. (1791).

(*x*) *Coles v. Forrest*, 10 Beav. 552.

(*y*) *Farmer v. Curtis*, 2 Sim. 466; *Fell v. Brown*, 2 Bro. C. C. 276. And the heir of the mortgagor must join with the mortgagee in conveying the

estate to a purchaser in completion of the mortgagor's contract, although the mortgagee is able to convey the legal estate. (*Daly v. Nalder*, 11 Jur., N. S. 921.)

(*z*) *Lewis v. Nangle*, 2 Ves. 430.

(*a*) 2 Ch. Ca. 32.

(*b*) *Uppington v. Bullen*, 2 Dru. & War. 184.



that both should be parties. As if one, claiming to be devisee of a mortgaged estate, seek as well to establish the will (*c*) as to redeem; or if his title as devisee be doubtful (*d*); then the interest of the heir in disputing the will makes him a necessary party.

If the heir and devisee, by reason of a doubt arising upon the will, both claim, one of them only should be plaintiff; for their claims are inconsistent. And the mere allegation without proof of an agreement between them to divide the estate will not alter this; because the existence and legality of such a contract cannot be assumed, and the parties must therefore be treated as if none such were in existence (*e*). The misjoinder, however, will not now defeat the action.

And so if the mortgaged estate be devised subject to a rent-charge, and the rent-charge descend to the heir, he must be a party with the devisee to the mortgagee's suit for foreclosure (*f*).

**1444.** To a suit to redeem by persons entitled under a will to a charge upon the equity of redemption, the trustees of the will are proper parties (*g*): because they may have a claim upon the estate. But in a case where the possessor of the legal estate, and all the persons beneficially entitled, were before the court, and the interest of none of the parties to the record required the presence of the heir at law of the surviving trustee, he was held to be so far a formal party, that, the objection for want of parties not having been taken till the hearing (*h*), a decree was made in his absence saving his rights.

**1445.** And legatees whose legacies are charged by the will of the mortgagor upon the mortgaged estate have an interest in the redemption, and are therefore necessary parties (*i*) to a suit in which that right is brought into question.

(*c*) *Lewis v. Nangle*, 2 Ves. 430.

(*d*) *Earl of Macclesfield v. Fitton*,  
1 Vern. 168.

(*e*) *Cholmondeley v. Clinton*, 2 J. &  
W. 135; but see 15 & 16 Vict. c. 86,  
s. 49.

(*f*) *Calvert*, 245.

(*g*) *Faulkner v. Daniel*, 3 Hare, 213.

(*h*) Cons. Ord. XXIII. r. 11.

(*i*) *Batchelor v. Middleton*, 6 Hare,

78.

*Of the Personal Representative of the Mortgagor.*

**1446.** The personal representative of the mortgagor is not generally a necessary party to a suit for foreclosure simply, or for redemption of a mortgage in fee, for he is neither interested in the accounts, nor entitled to redeem. And the possibility that the debt may have been paid is not a ground for making him a party to a simple foreclosure suit. It is for the heir to prove any payment by the mortgagor or his executor of which he claims the benefit, and the plaintiff is not bound to meddle with the personal estate, from which his remedy against the equity of redemption is quite distinct. But if it be alleged in a redemption suit that the mortgagee has been in possession and is overpaid, the personal representative of the mortgagor must be joined (*k*).

And so in a suit to enforce an equitable mortgage, it is not proper to bring forward the personal representatives of a deceased tenant for life of the mortgaged estate, merely because the defendants may have a right to reimburse themselves out of his assets, to the amount of arrears of interest accrued during his tenancy (*l*) (**1558**); the plaintiffs not being bound to meddle with any adjustment of accounts between the persons interested in the equity of redemption.

If the executors raise money for payment of debts by way of further charge upon an estate already in mortgage (*m*), the devisee seeking redemption on payment of the original mortgage only, need not make the executors parties in the first instance, if his claim does not recognize their interest, but leaves it to be brought forward in the defence.

**1447.** The personal representative of the mortgagor is a proper party to a suit to foreclose a mortgage of a subsisting term or other chattel interest (*n*). But not in a suit for determining the validity of the mortgage as between the mortgagee

(*k*) *Duncombe v. Hansley*, 3 P. W. 333, n.; *Grace v. Lord Mountmorris*, 2 Dru. & War. 432; *Baker v. Wetton*, 9 Jur. 98.

(*l*) *Wynne v. Styant*, 2 Ph. 305.

(*m*) *Greenwood v. Rothwell*, 7 Beav. 279.

(*n*) *Wilton v. Jones*, 2 Y. & C. C. C. 244.

and persons claiming under a voluntary settlement by the mortgagor (*o*). And, having no right of redemption in a term created out of the inheritance, for the purpose of making it a mortgage security, his presence is unnecessary upon foreclosure of such a term (*p*).

Where the representation to the mortgagor's estate is only by administration pendente lite, a judgment of foreclosure against the administrator only will not bind the persons beneficially interested (*q*).

**1448.** If the object be to obtain a sale either under a mortgage by way of trust (*r*) for sale, or on the suit of an unpaid vendor of real estate (*s*) or otherwise, or if the mortgagee pray for payment of any deficiency out of the personal estate of the mortgagor (*t*), the personal representatives of the latter are necessary parties, because they are interested in the produce of the sale, and in the taking of the accounts.

So where the suit is by the transferee of a mortgage of a lease for lives, and seeks a renewal of the lease, the fine and expenses of which may be chargeable on the estate of the mortgagor under his covenant (*u*).

**1449.** Also if it appear by the pleadings that the tenant for life has been in possession of the rents and profits, and has kept down the interest and made payments on account of the principal (*x*), his personal representative is a proper party to the suit as having an interest in seeing that the accounts are properly taken, and a possible right to stand to some extent as a creditor.

And so of the personal representative of a deceased sub-

(*o*) *Bostock v. Shaw*, 15 L. J., N. S., Ch. 257.

(*p*) *Bradshaw v. Outram*, 13 Ves. 234; *Bampfild v. Vaughan*, Rep. t. Finch, 104.

(*q*) *Ellis v. Deane*, Beat. 5.

(*r*) *Christophers v. Sparke*, 2 Jac. & W. 229.

(*s*) *Cave v. Cork*, 2 Y. & C. C. C. 130.

(*t*) *Daniel v. Skipwith*, 2 Bro. C. C. 154.

(*u*) *Gregson v. Hindley*, 7 Jur. 248.

(*x*) *Cholmondeley v. Clinton*, 2 J. & W. 134; *Faulkner v. Daniel*, 3 Hare, 207.

sequent incumbrancer, as of an annuitant under the will of the mortgagor, whose annuity was in arrear (*y*).

**1450.** When persons, who claim under the will of the mortgagor, charges on the equity of redemption, are entitled to have the real estate exonerated out of the personalty (*z*) (1114, 1136), they may require the presence of the testator's personal representatives; but in a case in which the mortgagor had been dead many years before the filing of the bill, and the mortgaged estate long treated as his only available property, an objection on account of the absence of the personal representatives taken for the first time at the hearing was not allowed, but a decree was made saving the rights of the representative (*a*) in his absence.

And so to a suit for sale by the surviving partner of a firm, where a deceased partner and another, being joint owners of an estate, had deposited the title deeds with the firm as a security for a debt, against the surviving owner and the heir of the deceased partner (*b*), the personal representative of the latter was held to be a necessary party to avoid circuitry of suit; the personal estate being then liable for the debt in exoneration of the descended realty.

**1451.** If the equity of redemption have been dealt with by the mortgagor in his lifetime, so as to be converted into personalty, his personal and not his real representative will be the proper plaintiff in a redemption suit (*c*) (813).

**1452.** Where a person died, having created an equitable mortgage, with an agreement to execute a legal mortgage, and his administratrix renewed the lease, and gave the original mortgagee a legal security with a power of sale, she was held (*d*) a necessary party in a suit to compel specific performance of a contract for sale under the power.

(*y*) *Hunt v. Fownes*, 9 Ves. 70.

(*z*) *Faulkner v. Daniel*, 3 Hare, 213;  
see 17 & 18 Vict. c. 113.

(*a*) Cons. Ord. XXIII. r. 11.

(*b*) *Scholefield v. Heafield*, 7 Sim.  
667; but see 17 & 18 Vict. c. 113.

(*c*) *Griffiths v. Ricketts*, 7 Hare, 305.

(*d*) *Sanders v. Richards*, 2 Coll. 568.

**1453.** An administrator acting under letters of administration, limited to substantiate proceedings in the suit, and granted by the proper court, sufficiently represents the intestate (*e*) for the purpose of binding the account (*f*), or if the purposes of the suit do not require a general or more extensive representation (*g*).

**1454.** If the heir or person claiming under the mortgagor an interest in the equity of redemption be out of the jurisdiction and cannot be served, or his residence or existence be unknown, the cause must stand over until the defect arising from the want of parties can be remedied (*h*), unless the suit be of such a kind that the plaintiff can in his absence have proper and sufficient relief. As where the heir of the mortgagor of a term of years being absent, the owner of the legal interest of the first mortgagee of the term, who had also contracted to purchase the equity of redemption, was declared to be a trustee of the legal interest for the second mortgagee (*i*). And a decree may be made against the trustees and some of the devisees of the proceeds of the sale of the mortgaged estate where the others are out of the jurisdiction (*j*).

If no heir can be found, the Attorney-General should be made a party (*k*), and his absence cannot be remedied by his appearance by counsel at the hearing (*l*). The Court will not direct an inquiry (under Cons. Ord. XX.) in a foreclosure suit as to who is the heir at law of the owner of the equity of redemption; the object of the order being to facilitate the hearing as against the parties to the suit, and not to strike them off the record (*m*).

(*e*) *Faulkner v. Daniel*, 3 Hare, 208;  
*Davis v. Chanter*, 2 Ph. 545.

(*f*) *Maclean v. Dawson*, 27 Beav.  
369.

(*g*) As in *Clough v. Dixon*, 10 Sim.  
564; *Groves v. Lane*, 16 Jur. 854.

(*h*) *Fell v. Brown*, 2 Bro. C. C. 276;  
*Anderson v. Stather*, 2 Coll. 209; *Farmer v. Curtis*, 2 Sim. 466.

(*i*) *Howes v. Wadham*, Ridg. Ca.  
temp. Hard. 201.

(*j*) *Runcorn v. Nicholson*, 5 L. J.  
(Ch.) N. S. 203.

(*k*) *Leahy v. Dancer*, 3 Mol. 108.

(*l*) *Catley v. Simpson*, 10 Jur., N. S.  
993.

(*m*) *Warner v. Moore*, 10 L. J. (Ch.)  
N. S. 371.

*Of the Persons claiming Interests in the Security and Debt.  
Of the Mortgagee.*

**1455.** Generally no suit can properly be brought against the mortgagee in respect of the mortgaged estate, unless there be an offer to redeem him, made by a person entitled to do so. And if there be no such offer the mortgagee may demur (*n*) (1170).

Therefore one who has agreed to purchase an equity of redemption, having no right to redeem until the completion of the purchase (for he who claims a right to redeem must first have acquired the mortgagor's title to a re-conveyance (*o*)), or having agreed to purchase an interest in a property which is afterwards mortgaged (*p*), cannot make the mortgagee, either of a legal (*q*) or equitable (*r*) interest, a party to a suit to compel specific performance of a contract in which he has no concern, or the performance of which will not affect his security or interfere with his remedies. And on a bill (*s*) by an alleged lessee against the lessor for discovery of the lease (which the defendant pleaded was invalid), and containing a prayer, that the lessor might redeem a mortgage made by him, the mortgagee of this mortgage was held, on demurrer, not to be a necessary party; probably, because the plaintiff's right to meddle with him depended upon the very question at issue in the suit, viz. the validity of the lease.

But if the mortgagor's title be impeached by the suit, the mortgagee, having a great interest in supporting it, and being often in possession of the deeds, ought to be joined (*t*).

**1456.** If the mortgagee admit his interest, he may be joined, without any offer to redeem, in a suit to carry out the trusts of a deed to which he was not a party, and by means of which it is intended to exonerate the mortgaged estate from the debt by

(*n*) *Tasker v. Small*, 3 Myl. & Cr. 63;  
*Dalton v. Hayter*, 7 Beav. 319; *Inman v. Wearing*, 3 De G. & S. 729.

(*o*) *Franklyn v. Fern*, Barn. Ch. 30—32; *Bickley v. Dorrington*, and *Monk v. Pomfret*, cited there.

(*p*) *Long v. Bowring*, 27 Beav. 585.

(*q*) *Tasker v. Small*, *supra*.

(*r*) *Hall v. Laver*, 3 Y. & C. 191.

(*s*) *Hitchins v. Lander*, Coop. Rep. 34.

(*t*) *Copis v. Middleton*, 2 Mad. 423.

payment thereof out of other estates(*u*). If, however, he claims no interest in such a suit, he must be careful to disclaim, and not to demur thereto, where the pleadings contain not merely a general allegation that the defendant is interested (which is not enough to prevent a demurrer) (*x*), but an express denial that he has any interest in the estates, followed by an allegation that he claims an interest the nature of which he ought to set forth; for by demurring he would admit the charge that he claims an interest, which makes his presence necessary.

**1457.** Where a mortgagee has assigned the whole benefit of his security, having previously been in possession, and the mortgagor seeks an account of an overplus alleged to have been received, the mortgagee, notwithstanding his assignment, must be joined with the assignee, that he may account for what he received in his time (*y*). But if the mortgagor seek only an account of what is due to the assignee, for the purpose of redemption, then, and it seems whether the mortgagor have or have not been a party to or had notice of the assignment, the mortgagee who has assigned need not be a party (*z*). In the latter case (*a*), because the assignee, having agreed to stand in the place of the original mortgagee, is bound by all the equities

(*u*) *Dalton v. Hayter*, 7 Beav. 313.

(*x*) *Plumbe v. Plumbe*, 4 Y. & C. 345.

(*y*) *Anon.*, 2 Eq. Ca. Abr. 594, Duchy; *Freem. Ch. Rep. Ca. 66*: said in *Powell*, 953, note (*m*), to be overruled by *Chambers v. Goldwin*, 9 Ves. 269. But Lord Eldon's observations did not extend to the case put here, of a mortgagee in possession, and an account sought of the overplus received. Upon the principle of the case cited, was decided *Lowther v. Carlton*, in which, according to the report in 2 Atk. 139, it was held, that if there have been several transfers of a mortgaged estate, a puisné assignee who had notice of the mortgage may call for the presence of the mesne assignee, who had no notice, or of his representatives, that he may avail himself of

the shelter afforded by the title of the other. The case thus put is doubted by Mr. Calvert, and in fact bears internal evidence of error; for it is stated that the very representatives were parties in respect of whose absence the objection was taken. The report in *Barn. Ch. 358*, shows, that, although the question of notice really arose the representatives were ordered to be joined, on the ground that they had been in possession, and that an account was sought of mesne profits. The case is also reported, but not on the question of parties, in *Ca. t. Talb. 187*.

(*z*) *Freem. Ch. Rep. Ca. 66*.

(*a*) *Hill v. Adams*, 2 Atk. 39; *Norrish v. Marshall*, 5 Mad. 475; *Chambers v. Goldwin*, 9 Ves. 269.

subsisting between him and the mortgagor, and cannot afterwards object to accounts which he has already taken on the credit of the assignor; and it seems upon principle, in the former also, because the assignor's accounts have been admitted by both parties (*b*).

If only part of the security have been assigned to a derivative mortgagee, for a less sum than the original debt, then upon a suit for redemption or foreclosure, the original mortgagee must be a party; for he claims an interest, viz. a right to redeem the assignee, and prevent another account (*c*). Yet if in such a case the objection of the absence of the original mortgagee be not taken until the hearing, the cause will be suffered to proceed without him, if, being a witness, he have sworn that he is fully satisfied and retains no interest (*d*).

**1458.** Where there are several tenants in common or joint tenants of the mortgage money, all must be parties (*e*).

**1459.** The second or other puisné incumbrancers may foreclose those subsequent, without joining those prior to themselves (*f*); for the latter can suffer no damage. The subsequent mortgagees, it is true, are left without the opportunity of redeeming all who are prior to themselves in the same suit; which, however inconvenient, is not thought to be unjust to-

(*b*) Freeman's Ch. Rep. Ca. 66, n.; *Car v. Boulter*, id. Ca. 290. In the case of *Barker v. Kellet*, Freem. Ch. Rep. Ca. 146, it is said, that to a redemption bill by the heir of the mortgagor against the assignee of the mortgage, seeking also discovery of what had been paid on the assignment, a demurrer to the discovery, and because the assignor was not a party, was allowed; for that he should not discover what he paid, and that if plaintiff would redeem he should pay what was due on the original mortgage. The reason does not justify the demurrer for want of parties, for the assignor's presence could not be required by the assignee, if the price of redemption was to be the original debt,

the assignee being clearly bound as to that. It seems that demurrers were formerly allowed in part. See Lord Red. 214. In an Irish case, in which the mortgagor was only a witness to the assignment, it was said that there ought to be a charge that he knew and agreed to its contents. (*Jamieson v. English*, 2 Mol. 337.)

(*c*) *Norrish v. Marshall*, 5 Mad. 475; *Hobart v. Abbot*, 2 P. Wms. 642.

(*d*) *Norrish v. Marshall*, *supra*.

(*e*) *Vickers v. Cowell*, 1 Beav. 529.

(*f*) *Rose v. Page*, 2 Sim. 471; *Briscoe v. Kenrick*, 1 L. J., N. S., Ch. 116; *Richards v. Cooper*, 5 Beav. 304; and see 3 Hare, 38.



wards those who, lending money upon incumbered estates, have a full knowledge of the state of the security.

Nor are the owners of prior incumbrances necessary parties to suits for sale (*g*) of the estate by subsequent creditors, the sale being made subject to those incumbrances. And a judgment creditor may proceed against a receiver and owner of estates (*h*), for satisfaction out of surplus rents by a former decree directed to be paid to the owner, without making prior incumbrancers parties.

It seems, however, that subsequent mortgagees, suing for an account and declaration of priority in their favour, have a right to the presence of a prior mortgagee, if the rights of the parties cannot be settled in his absence, though if the objection be not taken till the hearing, his rights will be saved by the judgment under Cons. Ord. XXIII. (11) (*i*).

**1460.** And an exception, the consequence of the nature of the relief, may arise where a mortgagee can be redeemed as to part only of his security, which, it has been held, may be done by a remainderman, as against the second mortgagee of a charge on the estate, made by a former tenant for life under a power, and by him mortgaged with other property, on payment of so much only of the amount of the charge as, the amount of the principal of the first mortgage being deducted, was comprised in the second mortgagee's security. In such a case it was held (*h*), that the prior mortgagee of the charge, as well as the personal representatives of the mortgagor, must be parties; the former as being interested in the amount comprised in the second mortgagee's security, and the latter in ascertaining whether the mortgagor had paid off any and what part of the charge in his lifetime.

**1461.** If a receiver be prayed of the general proceeds of the estate, this being an interference with the interests of prior

(*g*) *Delabere v. Norwood*, 3 Sw. 144, n.; *Parker v. Fuller*, 1 R. & M. 656.

(*h*) *Lewis v. Lord Zouche*, 2 Sim. 388.

(*i*) *Feltham v. Clark*, 1 De G. & S. 307.

(*h*) *Lord Kensington v. Bouverie*, 16 Beav. 194; 19 *id.* 39.

incumbrancers, will make their presence necessary (*l*). And the prior incumbrancers must be parties, if they have joined with the mortgagor in appointing a receiver, who covenants to keep down the incumbrances, and to pay the surplus to the mortgagor, to a suit against the receiver by subsequent incumbrancers, for an account and injunction against payment of the surplus to the mortgagor; because the receiver is agent for, and stands in a fiduciary relation to, all the incumbrancers (*m*).

*Of the Assignees and Devisees of the Security and Debt.*

**1462.** The person in whom the legal interest in the security becomes vested, whether it be by the original mortgage (*n*), by assignment (*o*), or by devise (*p*), and though he be only a trustee for the persons entitled to the mortgage money, is a necessary party to a suit for redemption (*q*), or foreclosure (*r*). To the one that a reconveyance may be obtained, to the other for the same reason if the defendant should redeem; and in case of a judgment for foreclosure, because the legal interest is to be protected by the judgment (**1708**).

And if the mortgagee have made an absolute conveyance with several limitations and remainders over, especially where the title to redemption depends upon equitable circumstances, as if the mortgage be of long standing (*s*), the first tenants in tail at least must be brought before the court.

The purchaser from a mortgagee under his power of sale is not a necessary party to a bill by the mortgagor against the mortgagee to recover the surplus purchase-money, and offering to confirm the sale (*t*).

**1463.** The rule also applies to trustees for the mortgagee in respect of their power to give discharges for the mortgage debt; and it renders necessary the presence of a trustee, who,

(*l*) *Gibbon v. Strathmore*, V.-C. E., cited Calvert, 16.

(*m*) *Ford v. Rackham*, 17 Beav. 485.

(*n*) *Wood v. Williams*, 4 Mad. 186.

(*o*) *Wetherell v. Collins*, 3 Mad. 255.

(*p*) *Wood v. Williams*, supra; *Wetherell v. Collins*, supra; *Hichens v.*

*Kelly*, 2 Sm. & G. 264.

(*q*) *Wetherell v. Collins*, supra.

(*r*) *Bartle v. Wilkin*, 8 Sim. 238; *Smith v. Chichester*, 2 Dru. & War. 404.

(*s*) *Yates v. Hambly*, 2 Atk. 237.

(*t*) *Minn v. Stant*, 15 Beav. 49.

having signified his resignation only by a memorandum endorsed on the trust deed, has not been fully discharged from the trust by the appointment of a successor (*u*).

The trustee of the legal interest in the security having no adverse rights may properly be, and to save expense to the mortgagor ought (*x*) to be, a co-plaintiff; though it has been thought a sufficient reason (*y*) for making him a defendant, that he *might have refused* to be a plaintiff.

**1464.** Persons with whom the mortgagee has dealt wrongfully for the produce of the mortgaged estate are proper parties to a redemption suit, as being in possession of the value of the converted part of the estate, though they no longer hold the property in specie (*z*).

*Of the Heir of the Mortgagee.*

**1465.** If the legal interest should descend, the heir of the mortgagee must be a party; and if the suit be for foreclosure, the mortgagee's executor, upon reviving, must join the heir. And this is by the same reason which makes a trustee of the legal interest a necessary party; for the heir is a trustee for the executor (*a*).

The rule, however, of course does not extend, as the reason does not apply, to an heir who has not the legal interest: so that the heir of a subsequent mortgagee need not be joined in a foreclosure suit by the prior mortgagee (*b*). But to a suit by the transferee of a mortgage of leaseholds for lives to compel a renewal, the heir of the original mortgagee was held to be a necessary party, because the new lease would not be granted without his consent (*c*).

If the legal interest have been devised by the mortgagee, the heir is not a necessary party (*d*).

(*u*) *Adams v. Paynter*, 1 Coll. 530.

(*x*) *Smith v. Chichester*, 2 Dru. & War. 404.

(*y*) *Browne v. Lockhart*, 10 Sim. 426.

(*z*) *Hood v. Easton*, 2 Jur., N. S. 729; see *id.* 917; 2 Gif. 692.

(*a*) *Scott v. Nicol*, 3 Russ. 476.

(*b*) *Whitla v. Halliday*, 4 Dru. & War. 267.

(*c*) *Gregson v. Hindley*, 7 Jur. 248.

(*d*) *How v. Vigneres*, 1 Rep. in Ch. 32. In *Skipp v. Wyatt*, 1 Cox, 353, the heir was made a party by the devisee to establish the will against him,

Where the heir at law could not be found the suit stood over (*e*), that the Attorney-General might be made a party to represent the legal interest (1454).

*Of the Personal Representative of the Mortgagee.*

1466. The mortgage debt being part of the mortgagee's personal estate, the security belongs, in equity, to his personal representatives; for whom, upon the death of the mortgagee after forfeiture, the heir, though in by descent, is only a trustee (*f*). Having, therefore, a right to receive the money upon redemption and to hold the estate upon foreclosure (*g*), their presence becomes necessary in suits of both kinds. But with this exception, that in a suit to redeem a Welsh mortgage of long standing, the court *excuses* (*h*) their absence, leaving the parties to controvert the matter between themselves. And this practice is evidently not from any want of interest in the personal representatives, but out of indulgence to the plaintiff, who might otherwise, after many years, find redemption impossible (11, 1196).

If tenants in common be entitled to the mortgage money the personal representatives of those who die must be joined (*i*). It is the same, though the persons entitled are in fact jointly interested as trustees, if there be nothing in the deed to show that the representatives of the deceased mortgagee are not entitled (for which the fact that the debt appears by the deed to be trust money is not sufficient) (*k*); because the right to money advanced by several persons jointly does not survive in equity.

So the personal representatives of the original mortgagee must be parties to the suit of his submortgagee to foreclose

and the plaintiff was ordered to pay the heir's costs, which it was said should not be thrown on the estate, because they arose from the mortgagee's act in disposing of the property. As a general rule, however, it is clear that the estate is liable to costs arising out of the lawful and reasonable dispositions of the mortgagee (1635).

(*e*) *Smith v. Bicknell*, 3 Ves. & B.

53, n.; and see *Casberd v. A.-G.*, 6 Price, 411.

(*f*) *Ellis v. Guavas*, 2 Ch. Ca. 50; *Wynn v. Littleton*, id. 51.

(*g*) *Freak v. Hearsey*, 1 Ch. Ca. 51.

(*h*) Per Lord Hardwicke, *Longuet v. Scawen*, 1 Ves. 406.

(*i*) *Vickers v. Cowell*, 1 Beav. 529.

(*k*) *Id.*

the original mortgagor (*l*), in respect of their right to redeem the submortgagee.

And the personal representative of an unpaid vendor of real estate (*m*) is a necessary party to a suit by the trustees of his personal estate for foreclosure; and if one of the trustees, being also the sole executor, die, the suit will abate as if he had been executor only, and not trustee; consequently his executors also must be made parties.

Although the absence of the mortgagee's personal representative do not appear till the hearing, the suit will not be permitted to proceed without him (*n*). And, where in his absence the heir of the mortgagee obtained a decree for foreclosure, the estate was decreed (*o*) to the personal representative upon his filing a bill for that purpose; though it was said by Lord Chancellor Jefferies (*p*), that in such a case the heir might well say to the executor or administrator,—“I will pay you the money and take the benefit of the foreclosure to myself,” in case the land were worth more than the money.

*Of the Persons beneficially interested, either in the Equity of Redemption or in the Security and Debt.*

**1467.** In all suits concerning real or personal estate which is vested in trustees under a will, settlement or otherwise, such trustees shall represent the persons beneficially interested under the trust, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and, in such cases, it is not necessary to make the persons beneficially interested under the trusts parties to the suit, but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons, or any of them, to be made parties (*q*). Before the passing of this statute, and the date of an order of court, which directed (*r*)

(*l*) *Hobart v. Abbott*, 2 P. Wms. 642.

(*m*) *Cave v. Cork*, 2 Y. & C. C. C. 130.

(*n*) *Meeker v. Tanton*, 2 Ch. Ca. 29.

(*o*) *Gobe v. Carlisle*, cited 2 Vern. 67.

(*p*) *Clerkson v. Bowyer*, 2 Vern. 67.

(*q*) 15 & 16 Vict. c. 86, s. 42, rule 9.

(*r*) 30th Order, August, 1841.

that devisees in trust of real estates, having power to sell and give discharges for purchase-monies, rents and profits, should represent the *cestuis que trust* to the same extent as they are represented by executors or administrators in suits concerning personalty, it was a general rule, that all persons beneficially interested in the equity of redemption or in the mortgage money should be made parties to suits affecting their interests.

The extent to which the interests of *cestuis que trust* may be represented by executors and administrators in suits concerning personalty is, therefore, subject to the discretion of the court, declared by the statute to be the standard by which the representative powers of trustees of real or personal estate, however the trust may have been created, is to be measured; and with regard to mortgages, it will be remembered that the executor or administrator is the proper person to sue (1259) and be sued (1447) in respect of securities on chattel interests, without the persons beneficially entitled (s).

**1468.** The effect of the statutory rule upon suits between mortgagor and mortgagee, relating to securities upon real estate, appears to be, that the *cestuis que trust* will be well represented by the trustees, where the latter have complete power over the estate, or have under their control funds applicable to the purpose of redemption: and the individual rights of redemption, which before the statute belonged to such *cestuis que trust*, will, to the extent to which they are so represented, be taken away.

Thus, in a suit for foreclosure (t) against the absolute devisees of the equity of redemption in one moiety of the estate, and against the devisees in trust of the other moiety, being also the executors of the mortgagor, the *cestuis que trust* of the second moiety were held not to be necessary parties; because all the persons, who had control over the property out of which the debt was to be paid, were present.

And on the same principle a decree may be made for sale of a mortgaged estate in the absence of the *cestuis que trust* of

(s) *Wilton v. Jones*, 2 Y. & C. C. C. 244.

(t) *Sale v. Kitson*, 17 Jur. 171; 3 De G., M. & G. 119.

the equity of redemption, where the devisees in trust are also executors of the mortgagor (*u*).

The right of redemption of the *cestuis que trust* of a puisné mortgage (*x*) will in like manner be bound if the trustees being themselves mortgagees, or taking the mortgage as executors, be alone made parties to the suit.

If, however, the devisees in trust of the estate be not executors of the mortgagor, it seems that the old rule will remain in force (*y*).

**1469.** And it is to be observed, that there is a distinction between cases arising under wills and those under settlements, viz. that in the latter the trustees of the persons entitled to redeem have not generally the control over any other than the settlement fund, and may therefore be without the means of redeeming; in such cases the court will not permit adult *cestuis que trust* to be foreclosed (*z*), without an opportunity of redeeming, but will require (*a*) either that they be made parties, or that an affidavit be produced to the effect that they have had notice of the proceedings, and do not object to the proposed decree. The same principle applies to the case of a will where, the surviving trustees of the will having disclaimed, the mortgagor's estate is represented only by an infant heir (*b*). And where the equity of redemption is settled in trust for the mortgagor for life, with remainder to his children, and the children of such as should die, it seems that the mortgagor's infant grandchildren, whose parents are dead, as well as the representative of a deceased child, who has been a defendant, ought to be joined in a foreclosure suit (*c*). But if, instead of

(*u*) *Hanman v. Riley*, 9 Hare, App. xl.; *Marriott v. Kirkham*, 3 Gif. 536; see *Shaw v. Hardingham*, 2 W. R. 657.

(*x*) *Goldsmid v. Stonehewer*, 9 Hare, App. xxxix; 17 Jur. 199.

(*y*) See *Coles v. Forrest*, 10 Beav. 557.

(*z*) *Goldsmid v. Stonehewer*, *supra*. So the case of *Calverley v. Phelps*, 6 Mad. 229, before the act, though there was a power for the parties to give re-

ceipts, which it was held only made the concurrence of the *cestuis que trust* unnecessary in case of a sale.

(*a*) *Tuder v. Morris*, 1 Sm. & Gif. 503.

(*b*) *Young v. Ward*, 10 Hare, lviii; and see *Chamberlain v. Thacker*, 13 Jur. 785; 14 id. 190.

(*c*) *Siffken v. Davis*, Kay, xxi. The observations of Wood, V.-C., only referred directly to the representative of

the usual decree in such a suit, a sale be directed, and the money be ordered into court (such proceeding being shown to be beneficial to the infant), the presence of these parties will be unnecessary (*d*).

The distinction above referred to appears to take out of the operation of the statute, as regards adult *cestuis que trust*, all cases arising under wills, where the devisees in trust, not being also executors, have no fund applicable to the purposes of redemption (*e*).

And even in the case of a settlement, if the *cestuis que trust* be infants, or if their shares have been again settled, inasmuch as the infants and the trustees of the sub-settlements cannot be expected to be in a position to redeem, they will be well represented by the trustees of the original settlement. And so will the *cestuis que trust* under a creditor's deed, by the terms of which the trustees have no power over the mortgaged estate (*f*).

Where amongst the subsequent incumbrances on an estate, the subject of a foreclosure suit by the first mortgagee, there were eight mortgages made on the same day, in respect whereof only one right of redemption was given (1686), and one of the eight mortgagees died, to whose estate there was a difficulty in getting representation, the suit was ordered to proceed without a representative (*g*).

Where the mortgagor sues for redemption, and there is but a single mortgage which has passed by the will of, or by assignment from, the mortgagee, the *cestuis que trust* under

the deceased defendant; but his allusion to the rule in *Goldsmid v. Stonehewer* seems to involve the point respecting the infants, which was also debated,

(*d*) *Siffken v. Davis*, *supra*.

(*e*) This position seems to be supported by a decision of Stuart, V.-C., in which he refused to allow a devisee of an equity of redemption of freehold to represent the persons beneficially interested: *Cropper v. Mellersh*, 1 Jur., N. S. 299. But see *Wilkins v. Reeves*, 24 L. J. 337. The following cases, decided before the statute, appear to

come within the distinction: *Anderson v. Stather*, 2 Coll. 209; *Wilton v. Jones*, 2 Y. & C. C. 244; *Coles v. Forrest*, 10 Beav. 557; *Drew v. Harman*, 5 Price, 319; *Whistler v. Webb*, Bunb. 53; *Henley v. Stone*, 3 Beav. 355.

(*f*) *Goldsmid v. Stonehewer*, 9 Hare, App. xxxix; *Morley v. Morley*, 25 Beav. 253.

(*g*) *Long v. Storie*, 23 L. J. (Ch.) N. S. 200. According to the report in *Kay* (App. xiii), a creditor was appointed representative for the purpose of the suit.



the will or settlement will probably be no longer necessary parties with their trustees (*h*).

1470. Where one of several *cestuis que trust* of mortgage money sues for foreclosure, the others must also be made parties, a practice which is founded upon the principle, that for preventing a multiplicity of suits there shall be no foreclosure or redemption, unless the parties entitled to the whole mortgage money are before the court (*i*). A later case in which one of several persons entitled to distinct shares of money laid out by trustees in a single sum, having sued for an account, and foreclosure of a proportion of the security, without joining the other persons entitled, a decree was made according to the prayer (*k*), has caused some perplexity; and the cases have been thought to be distinguishable (*l*) by the circumstance that in the case of *Lowe v. Morgan*, the *cestuis que trust* were joint tenants of the money laid out in their trustees' names, but in the case of *Montgomerie v. Bath*, the mortgagees were tenants in severalty or in common; and it has been concluded, that one joint tenant of money so laid out cannot foreclose without the concurrence of the other joint tenants, but that a tenant in severalty or in common, having money on the same mortgage and in the name of the same trustee as another person, may foreclose without making that other person a party.

But this distinction strikes at the design of the practice to avoid a multiplicity of suits; to which the borrower of money belonging to tenants in common must be exposed, if any one of them can sue him alone. The learned editor of Mr. Powell's work attempts to avoid this objection by the argument that there is a difference between splitting one mortgage into different sums belonging to several persons, and the case where several persons lend distinct sums on the same security; for, in the latter case, the mortgagor knows at the time of borrowing the money how many suits can be brought against him. But

(*h*) See *Wetherell v. Collins*, 3 Mad. 368.

255; *Osborn v. Fallows*, 1 Russ. & M. 741; 5 L. J., Ch. 29.

(*i*) *Lowe v. Morgan*, 1 Bro. C. C.

(*k*) *Montgomerie v. Bath*, 3 Ves. 560.

(*l*) *Powell*, Mort. 964, n. (*c*).

it does not appear by the report of *Montgomerie v. Bath*, that the mortgagor knew in what right the money belonged to the lenders. On the contrary, the security was made, and the debt was made payable to the trustees alone, and the trust was declared by a subsequent deed poll; and it is submitted with deference, that whether the money be a single sum advanced by joint tenants in the name of the trustee, or composed of distinct sums to which different persons are entitled in severalty (*m*), it is equally the practice not to disclose the trust on the face of the mortgage, but to make the trustee alone the mortgagee, and the person entitled to receive the money. The fact is, that the decision in question, although the *Reg. Lib.* is said not to show (*n*) that it was made by consent, is distinctly stated by the reporter to have been made without opposition at the hearing; and there will, consequently, be little difficulty in following Mr. Belt's opinion (*o*) of its incorrectness; especially as the doctrine of *Lowe v. Morgan* has been since judicially confirmed (*p*).

**1471.** The presence of the persons beneficially interested under a will is not necessary in a suit by the executor and trustee to recover money lent by him on mortgage, under a power of investment contained in the will, even though the will contain no power to give discharges for the mortgage monies; because that power is implied by the nature of the trust (*q*).

**1472.** The court will not permit the representatives of a deceased trustee of a mortgage, or even the surviving trustees (at least where the original number has been much reduced), to redeem without the presence of some of the *cestuis que trust*, lest the trustees should misapply the mortgage money. But the mortgagee would be safe upon such a redemption without the *cestuis que trust* (*r*).

(*m*) See *Jones v. Pugh*, 12 Sim. 470; 1 Ph. 96.

(*n*) 1 Sim. & S. 425.

(*o*) 1 Bro. C. C. 368, Mr. Belt's note.

(*p*) *Palmer v. Earl of Carlisle*, 1 Sim. & S. 423.

(*q*) *Wood v. Harman*, 5 Mad. 368; and see *Locke v. Lomas*, 5 De G. & S. 326; 16 Jur. 814. See 23 & 24 Vict. c. 145, s. 29.

(*r*) *Stansfield v. Hobson*, 15 Beav. 189.

**1473.** If several of a body of trustees, where the *cestuis que trust* are many and fluctuating, commence a suit against the rest of the trustees, and a purchaser claiming an absolute title under a power of sale in a mortgage, and offering to confirm the sale, but claiming the benefit of it as against the mortgagee(s), so many at least of the *cestuis que trust* for the time being, as had not consented to the suit, ought, under the practice formerly pursued, to have been made parties, their interests being inconsistent with those of the rest. But part of the consenting *cestuis que trust* could, under the sanction of a majority of the whole body, represent the rest of the consenting parties, where the majority had a right to give a sanction to the transaction in question. It does not seem likely that, in such cases, the presence of any less number of the *cestuis que trust* would be sufficient under the present practice.

**1474.** Before the passing of the statute now under consideration, it was necessary to join scheduled creditors under a deed of assignment for the benefit of creditors where they have executed the deed(t); but where the trustees have no interest distinct from such creditors, nor any duty but to get in and distribute the property, it is probable that the presence of the creditors will not now be required; for it seems, that such creditors have not in themselves any right of redemption apart from the trustees(u). Where, besides redemption, a declaration is sought as to the priorities of the plaintiff, and the other incumbrancers(x), it is not easy to see how scheduled creditors (the doubt as to the amount of whose interests implies a contest between each of them and every other claimant on the estate), can be adequately represented by the trustees.

A small number of scheduled creditors may, however, represent the rest(y) in the suit, if it be shown that there is a

(s) See *Minn v. Stant*, 12 Beav. 190; 15 Id. 49.

(t) *Newton v. Earl of Egmont*, 4 Sim. 574; 5 Id. 130; *Cocker v. Egmont*, 6 Id. 311; *Thomas v. Dunning*,

5 De G. & S. 618.

(u) *Troughton v. Binkes*, 6 Ves. 573.

(x) *Newton v. Earl of Egmont*, supra.

(y) *Holland v. Baker*, 3 Hare, 68.

good reason for omitting the entire body, and that a proper choice has been made. It seems essential to such a choice, that no representing creditor should have any interest in the matter, conflicting with the interests of those whom he represents; as, for instance, an interest in the equity of redemption, in addition to his right as a creditor under the deed of trust.

Scheduled creditors, who are not parties to the deed of trust, need not be parties to the suit (*z*).

**1475.** *Cestuis que trust*, who have neither been parties nor privies to a mortgage security, by which the fund was invested in breach of trust, and who have not adopted the transaction, are not necessary parties to a foreclosure suit by the trustees (*a*). If, in such a case, the *cestuis que trust* have adopted the transaction, it seems that they should be co-plaintiffs if made parties to the suit, which, however, would probably be now unnecessary (*b*).

The equitable tenant in tail (*c*) was and will probably still be a necessary party with the trustees of the legal estate, who have power to sell and give discharges for the purchase-money, where the object of the bill is to sell the settled estate.

The persons beneficially interested under a will are not necessary parties (*d*) to a suit by an executor against his co-executor, to realize a mortgage debt due from the latter to his testator. And it seems (*e*), that *cestuis que trust* under a will may be represented by the personal representative, in a suit by an equitable mortgagee of the testator, to whom the representative has given a legal mortgage and power of sale, to enforce specific performance of a sale under the power.

A person who claims to be interested in part of a debt,

(*z*) *Powell v. Wright*, 7 Beav. 444. See also as to joining scheduled creditors, *Gore v. Harris*, 15 Jur. 761; and see *Smart v. Bradstock*, 7 Beav. 500; *Doody v. Higgins*, 9 Hare, xxxii; *Walwyn v. Coutts*, 3 Mer. 707; *Garrard v. Lord Lauderdale*, 3 Sim. 1;

2 Russ. & M. 451.

(*a*) *Allen v. Knight*, 5 Hare, 280.

(*b*) *Ibid.*

(*c*) *Berkley v. Lord Reay*, 2 Hare, 306.

(*d*) *Peake v. Ledger*, 8 Hare, 313.

(*e*) *Sanders v. Richards*, 2 Coll. 568.

secured by a mortgage to another person, is sufficiently represented by the latter in a suit to set aside the security, and ought not to be made a party to it (*f*).

If the trustee in whose name money is lent on mortgage be a solicitor, an ordinary part of whose duty it is to lay out money for his clients, he is not bound (*g*) to discover the names of his *cestuis que trust*, or to produce documents relating to the transactions, if he cannot do it without a breach of professional confidence, notwithstanding any inconvenience which may arise to the plaintiff from want of the information. For the liability to make the discovery may ruin the business of the solicitor; and the debtor would have an unfair hold upon his creditor, if the latter should happen to be a person who had forfeited his legal rights.

*Of Assignees, pendente Lite, of the Mortgagor and Mortgagee.*

**1476.** It is a rule which has been long recognized both in Courts of Law and Equity, and which arises out of the maxim "*pendente lite nihil innovetur*," that he who purchases an interest in litigated property pending the suit, acquires for the purposes of the suit no right distinct from that of his assignor (*h*). And this rule being grounded upon the reason (*i*), that any person interested in the subject-matter of a cause, might otherwise harass the other parties to the suit by making occasions for the addition of new parties, is limited in its action to the particular suit pending which the assignment is made, and does not prevent the assignees from enforcing their rights in any other suit.

If, therefore, pending a suit for redemption, the equity of redemption be assigned by the mortgagor, the assignee will

(*f*) *Emmet v. Tottenham*, 10 Jur., N. S. 1090.

(*g*) *Jones v. Pugh*, 1 Ph. 96; 6 Jur. 613; *Harvey v. Clayton*, 2 Swanst. 221, n.

(*h*) *Co. Litt.* 102 b; *Metcalf v.*

*Pulvertoft*, 2 V. & B. 200; *Bishop of Winchester v. Paine*, 11 Ves. 201. See *Trye v. Earl of Aldborough*, 1 Ir. Ch. R. 666.

(*i*) *Metcalf v. Pulvertoft*, *supra*.

be bound (*k*). And *à fortiori* in a foreclosure suit, where the mortgagee is an active party (*l*).

The rule applies equally to assignments by the plaintiff and the defendant; and as well to those which affect the whole equitable estate or interest in question in the suit, as those by which one of several parties assigns his or her separate interest (*m*),

Nor is the death of the assignor after the assignment material. For the assignee cannot acquire by the death of the assignor any better title than he had before, but will be as much bound by the judgment against the representative as he would have been if it had been against the assignor himself (*n*).

The rule in question has been stated, with a reservation, by Lord Redesdale, who says (*o*), "if the suit proceeds without disclosure of the fact;" and in some cases (*p*) it has been considered that the assignee was a necessary party (although in one case he consented to appear and be bound), on the ground that the suit could not be prosecuted when the subject of it had been transferred to one who was not a party. It is submitted that the cases cited (*q*) by Lord Redesdale are no authority for the restriction which he places upon the rule; and it does not appear by the reports that any of the authorities (with the single exception of the case of *Eades v. Harris*) upon which the rule in question is founded, or the rule itself, were submitted

(*k*) *Garth v. Ward*, 2 Atk. 175.

(*l*) *Bishop of Winchester v. Paine*, supra.

(*m*) *Eades v. Harris*, 1 Y. & C. C. C. 234.

(*n*) *Bishop of Winchester v. Paine*, 11 Ves. 197. But this seems to be doubted by Lord St. Leonards, who distrusts the case cited as a precedent, and intimates that the question will probably turn upon the *laches* of the plaintiff in reviving the suit. (V. & P. 1045, ed. 11; 758, ed. 14; see *Drew v. Earl of Norbury*, 3 J. & L. 282.)

(*o*) *Mitf. Pl.* 73.

(*p*) *Johnson v. Thomas*, 11 Beav. 501; *Solomon v. Solomon*, 13 Sim. 517. And see *S. C.* 7 Jur. 806, and note.

(*q*) *Metcalfe v. Pulvertoft*, 2 V. & B. 200; *Daly v. Kelly*, 4 Dow. 417. Lord Eldon in this case says, that "where there is an alienation pending the suit, though that would not prejudice the plaintiff, yet the alienee must be brought before the court;" but he spoke on the assumption that the alienee had the legal estate, which depends on a different principle.

to the learned judges by whom the cases under consideration were decided. Considering the language used by Sir William Grant and Sir T. Plumer, it is difficult to understand the force of Lord Langdale's reasoning in the case of *Johnson v. Thomas*. It is distinctly laid down that equity takes no notice of an assignment pendente lite, for the purposes of that suit. "As to the litigating parties," says Sir William Grant, "it is as if no such title existed." For all the purposes of the suit the mortgagor remains the substantial plaintiff, his assignment pending the suit, and *quoad* the other parties to it, being ineffectual. The mortgagee can sustain no injury; for the assignee has no interest or right of redemption against him; neither are the mortgagor's rights less liable to the decree in case it be against him, than if there had been no assignment (*r*).

**1477.** But where a legal interest passes by the assignment, the assignee's presence becomes necessary; because although the legal interest will be bound in his hands, so as to make him a trustee for the person entitled under the decree, yet unless he be joined, he cannot be compelled to reconvey (*s*).

Neither does the rule apply to a person who, like the assignee in insolvency of the mortgagor (*t*), being no voluntary purchaser, but appointed in an adverse proceeding against him, is not bound by a decree in a suit carried on in his absence.

**1478.** It should be observed, that the doctrine as to binding

(*r*) *Coles v. Forrest*, 10 Beav. 552; and see *Higgins v. Shaw*, 2 Dru. & War. 362; *Landon v. Morris*, 5 Sim. 247, 269; *Wood v. Surr*, 19 Beav. 551; *Massy v. Batwell*, 4 Dru. & War. 68, 80; *McLeod v. Annesley*, 16 Beav. 607. In the last case it was also intimated, that an incumbrancer *pendente lite* of an equitable interest may be bound in a suit relating to the trusts of a deed by rule 4 of 15 & 16 Vict. c. 86, s. 42; which enables one of several *cestuis que trust* to have a decree without serving the others. In the case of *Quarrell v. Beckford*, 1 Mad. 269, a

decree was held not to bind assignees, *pendente lite*, who were not parties. The grounds of the decree do not appear, but there were questions of over-payment and collusion, and the foreclosure decree had not been made absolute.

(*s*) *Bishop of Winchester v. Paine*, 11 Ves. 199; *Barry v. Wrey*, 3 Russ. 465. In *Coles v. Forrest*, 10 Beav. 552, the legal interest appears to have been assigned; and see *Higgins v. Shaw*, 2 Dru. & War. 362; *Massy v. Batwell*, 4 Dru. & War. 80.

(*t*) *Wood v. Surr*, 19 Beav. 551.

incumbrancers *pendente lite*, may have been affected by the statute 2 & 3 Vict. c. 11. It is evident, that where there was no actual notice, the rule arose out of the doctrine that *lis pendens* bound all the world (*u*). Hence Sir William Grant remarks upon the hardship of the rule, upon persons who purchase without *actual* notice (*x*). But by the statute above mentioned, no *lis pendens* binds unless the suit be registered (961); and unless the doctrine be held to stand independent of notice, it seems to follow that where there is no actual notice, the purchaser *pendente lite*, not being party to the suit, will not be bound, unless it be duly registered (*y*).

1479. Under the present law an assignment *pendente lite* does not create an abatement, and the action may be continued by or against the person to or upon whom the estate or title has come or devolved (*z*). And assignees *pendente lite*, who, after decree, and as well after as before certificate of the sums due in foreclosure suits, were brought before the court by orders of revivor and supplement under the Equity Improvement Act (*a*), will now be joined by order under the Judicature Act.

It is not proper for the assignee to commence a new suit against the parties to the former suit, other than the assignor, after a judgment to account. A suit by an assignee of a subsequent mortgage, against the parties to the former suit, praying the benefit of that suit, and the redemption of prior and foreclosure of subsequent mortgagees, was, as against all but the assignor, dismissed with costs (*b*).

As the assignee *pendente lite* stands in the place of his assignor, he cannot raise an objection for want of parties, which could not have been raised by the assignor (*c*).

(*u*) Tothill, 45; Worsley v. Earl of Scarborough, 3 Atk. 392.

(*x*) 11 Ves. 197; see Landon v. Morris, 5 Sim. 247.

(*y*) Note that in the case of Wood v. Surr, 19 Beav. 551, there was actual notice.

(*z*) Judicature Act, 1875, Ord. L.

(1), (3); and see the other sub-sections.

(*a*) 15 & 16 Vict. c. 86, s. 52; Ingham v. Waskett, L. R., 11 Eq. 283; Bibby v. Naylor, L. R., 17 Eq. 14; James v. Harding, 24 L. J., Ch. 749.

(*b*) Booth v. Creswicke, 8 Sim. 352; 8 Jur. 323.

(*c*) Wood v. Surr, 19 Beav. 551.



**1480.** Where, in a suit for account and payment out of mortgaged estates, discovery is sought of incumbrances prior to the plaintiff's, the defendant cannot take an objection on account of the absence of prior incumbrancers (*d*) ; because the subject of the objection is the very discovery sought by the bill for the purpose of making those persons parties.

(*d*) *Rawlins v. Dalton*, 3 Y. & C. 447.

## CHAPTER XI.

### OF TAKING THE ACCOUNTS.

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PART 1.—OF ACCOUNTS GENERALLY BETWEEN THE MORTGAGOR AND MORTGAGEE,

PART 2.—OF ACCOUNTS OF INTEREST,

PART 3.—OF ACCOUNTS OF COSTS,

—◆—

#### PART 1.

**1481.** *Who is bound by Accounts.*

**1486.** *Of Accounts against the Mortgagor, and of the Rents and Profits,*

**1496.** *Of Accounts against the Mortgagee and his Assignees.*

**1503.** *Of Accounts against the Mortgagee in Possession.*

**1524.** *Of the Manner of Charging the Mortgagee in Possession, and of Allowances to the Mortgagee.*

**1540.** *Of taking the Account with Rests.*

**1548.** *Of Carrying on the Accounts.*

**1481.** AN account, whether taken out of or in court, between the mortgagee and the mortgagor, or persons standing in his place, binds subsequent incumbrancers, though they were not privy to the taking of it, unless there be fraud or collusion; and particular errors must be shown, for to a merely general charge that the account was taken by fraud and collusion, a simple denial will be sufficient (*a*).

And an account taken in court between the mortgagee and the tenant for life of the estate, will bind the person entitled to the vested remainder, though he were no party to the suit; as well as a contingent remainderman, though not *in esse* when

(*a*) *Sherman v. Cox*, 3 Rep. in Ch. 85; *Needler v. Deeble*, 1 Ch. Ca. 299; *Wrixon v. Vize*, 2 Dru. & War. 192; notwithstanding *Dick v. Butler*, 1 Mol. Knight *v. Bampfild*, 1 Vern. 179; 42; *Williams v. Day*, 2 Ch. Ca. 32.

the accounts were taken (*b*) (1434); but accounts taken in the absence of the tenant for life, and of every other person interested in their correctness, will not bind the remainderman (*c*). Upon the same principle the mortgagor, or a person claiming under him, is not bound by accounts taken in his absence between the mortgagee and the assignee; and whatever the latter may have paid, he can claim under his assignment no more than is really due as between the mortgagor and the mortgagee, and is subject to have the accounts taken from beginning to end, though he had no notice by endorsements on the deeds, or otherwise, that part of the debt had been discharged (*d*) (1515). But it seems, that if redemption be sought after a great length of time, or the dismissal of a former bill to redeem, or several assignments, the account will not be taken (*e*) against an assignee in possession, but from the time of his purchase; prior to which the profits will be set against the interest.

Where an insolvent is party to the suit he is bound by the accounts, though the person who represents his estate be absent (*f*). Where the tenant for life is a party to the suit, and the accounts have been fairly taken, the remainderman being bound, will only be allowed to surcharge and falsify (*g*). And an infant heir will be bound by an account taken in a suit in which his ancestor was plaintiff; but leave will also be given him to surcharge and falsify (*h*). But it seems that, in the case of married women, the court will not dispense with the taking of an account, and the substitution, by consent, of an affidavit verifying the amount due (*i*).

(*b*) *Allen v. Papworth*, 1 Ves. 163; Belt's Sup. 91; see 2 Dru. & War. 205.

(*c*) *Wrixon v. Vize*, 2 Dru. & War. 192; *Dick v. Butler*, 1 Mol. 42.

(*d*) *Porter v. Hubbart*, 3 Ch. R. 78; *Matthews v. Walwyn*, 4 Ves. 118; *Chambers v. Goldwin*, 9 Ves. 254; *Mangles v. Dixon*, 3 H. L. C. 737; *Earl Macclesfield v. Fitton*, 1 Vern. 169. If the mortgagor were a witness, but not a party to the assignment, the bill should charge that he knew and agreed

to the contents of the deed. (*Jamieson v. English*, 2 Mol. 337.)

(*e*) *Pearson v. Pulley*, 1 Ch. Ca. 102.

(*f*) *Byrne v. Lord Carew*, 13 Ir. Eq. R. 1.

(*g*) *Wrixon v. Vize*, 2 Dru. & War. 192.

(*h*) *Badham v. Odell*, 4 Bro. P. C. 349.

(*i*) *Harrison v. Kennedy*, 10 Hare, li.

The transferee of a mortgage will be bound by a statement in the deed as to the amount due on the security, notwithstanding a special receipt clause to the effect that part of the sum is for costs, the amount of which is to be afterwards adjusted (*h*).

Sureties are bound by the accounts of a receiver appointed by the court, where the accounts are regularly passed according to the course of the court (*i*) (693).

**1482.** The accounts taken in a suit by a subsequent incumbrancer against the mortgagor and the prior incumbrancer, bind the mortgagor as to the amount of the debt due to the prior incumbrancer, so long as the judgment remains unimpeached (*m*).

But accounts taken in a suit are not binding upon the co-defendants to the suit, as between themselves, except so far as the relief sought by the plaintiff required that such accounts should be taken as between those defendants. In the case, therefore, of a simple suit to redeem against several incumbrancers, it being unnecessary for the purposes of the judgment to take the accounts between the co-defendants the subsequent incumbrancers, any accounts so taken will not be binding as between them (*n*); nor will the court in such a suit suffer one defendant to interrogate another as to his claims, where the discovery is unnecessary for the purposes of the decree, though it might be otherwise useful to the party seeking it; it being a principle that, except for the purposes of the suit, no party to a suit may examine another (*o*).

**1483.** The accounts also, whether they be taken in the presence or absence of the interested parties, are not abso-

(*h*) In re Forsyth, 11 Jur., N. S. 213; S. C. id. 615.

(*i*) Mead v. Lord Orrery, 3 Atk. 244.

(*m*) Farquharson v. Seton, 5 Russ. 45.

(*n*) Cottingham v. Earl of Shrews-

bury, 3 Hare, 627.

(*o*) See the Judicature Act, 1873, s. 24 (8). But the powers there given will doubtless be so exercised, that the plaintiff is not delayed by the raising of questions between co-defendants and others,

lutely binding; they may be opened for fraud or surcharged and falsified for error (*p*), either of law or fact.

The relative situation of the parties, the manner in which the settlement of accounts took place, or the nature of the error proved, may amount to such fraud as will determine the court to open a settled account (*q*); and this has been done after more than twenty years and the death of the person guilty of the fraud. But liberty to surcharge and falsify is given where there are only mistakes and omissions in the stated accounts (*r*); and it depends upon the principle, that one error having been proved others may be found. In either case the party seeking relief must prove fraud or particular errors, and his proof must be founded upon specific charges or statements in the bill (*s*).

But where the relation of solicitor and client subsists between the mortgagor and mortgagee, it has been held in Ireland that the accounts will be opened between them merely on a general allegation of error, if sufficient cause be shown; this doctrine, which indeed is somewhat ambiguous, has not been supported by the Court of Chancery in England: yet in that court the account would have been opened on slighter evidence than where the relation of attorney and client did not exist; although it is understood that where fraud, or error amounting to evidence of fraud, in the bill of costs, which forms the subject of the security, are relied on, there must be averment and proof of the specific items relied on as fraudulent or erroneous (*t*).

(*p*) *Vernon v. Vawdry*, 2 Atk. 119; *Chambers v. Goldwin*, 9 Ves. 265; *Drew v. Power*, 1 Sch. & Lef. 192; *Needler v. Deeble*, 1 Ch. Ca. 299; *Taylor v. Haylin*, 2 Bro. C. C. 310. As to counter-claim to open accounts, see *Eyre v. Hughes*, L. R., 2 Ch. Div. 148.

(*q*) *Roberts v. Kuffin*, 2 Atk. 112.

(*r*) *Vernon v. Vawdry*, *supra*; *Roberts v. Kuffin*, *supra*; *Davies v. Spurling*, Tam. 199; *Allfrey v. Allfrey*, 1 Mac. & G. 87; *Coleman v. Mellersh*, 2 id. 309.

(*s*) *Drew v. Power*, 1 Sch. & Lef.

192; *Chambers v. Goldwin*, 9 Ves. 266; *Taylor v. Haylin*, 2 Bro. C. C. 310; *Parkinson v. Hanbury*, L. R., 2 E. & I. App. 1. Note, however, that this liberty has been given to a judgment creditor seeking to open a foreclosure to which he was not a party, where, before decree, the mortgagee had notice of the judgment. (*Bird v. Gandy*, 7 Vin. Abr. 45, pl. 20; 2 Eq. Ca. Abr. 251.)

(*t*) *Lewes v. Morgan*, *Morgan v. Lewes*, *Morgan v. Evans*; 3 Y. & J. 230, 394; 5 Price, 42; 3 Anst. 769; 4 Dow, 29; 8 Bligh, N. R. 777; 3 Cl.

**1484.** Particular statements of error are also only necessary where the object of the suit is to impeach a settled account, and not where an account is prayed and no settled account is proved; though the pleading suggests the existence of a settled account. In such a case liberty will be given to surcharge and falsify, if upon inquiry any settled account be found to exist, whether specific errors have been charged or not (*u*).

An error in the accounts not detected in, but corrected and satisfied before the commencement of the suit, is no ground for a decree to surcharge and falsify the accounts (*v*); on the other hand, a person whose account is impeached, cannot (*x*) deprive his opponent of the benefit arising from the existence of errors in the account, or alter his rights, by giving him notice in the progress of the suit, as he from time to time discovers errors, that he is willing to correct them.

**1485.** In touching settled accounts the court looks at the principle involved, and not at the amount of the error, and will grant relief, however small may be the sum in question. Relief has thus been given upon an error of only a few shillings (*y*).

The principle of purging an account, admitted to contain an error, by setting off against it an error alleged to have been made in another account, in favour of the person prejudiced by the first, is inadmissible (*z*).

It appears not to have been decided whether, where there are several distinct accounts, in some only of which errors are alleged and proved, all become liable to be surcharged and falsified (*a*).

& F. 159; *Lawless v. Mansfield*, 1 Dru. & War. 557; *Matthews v. Wallwyn*, 4 Ves. 118; *Morgan v. Higgins*, 1 Gif. 270; *Waters v. Taylor*, 2 My. & C. 526; *Blagrave v. Routh*, 2 K. & J. 509, and on appeal, 3 Jur., N. S. 399; 8 De G., M. & G. 620.

(*u*) *Kinsman v. Barker*, 14 Ves. 579; *Lawless v. Mansfield*, 1 Dru. & War. 557.

(*v*) *Davies v. Spurling*, Tam. 199;

1 R. & M. 64.

(*x*) *Lawless v. Mansfield*, 1 Dru. & War. 557.

(*y*) *Lewes v. Morgan*, 5 Price, 86; *Lawless v. Mansfield*, 1 Dru. & War. 616.

(*z*) *Lawless v. Mansfield*, *supra*.

(*a*) *Ibid.*; and see *Chambers v. Goldwin*, where, however, the commission complained of extended to all the accounts. (9 Ves. 254.)

If a settled account be proved, as set up by the answer, and no error be shown by the plaintiff, the bill will be dismissed (*b*).

The reservation in an account of "errors excepted" does not prevent it from being considered as settled; and such an account will be taken to be settled, where the balance is carried over to a new account (*c*).

It seems that where a plaintiff prays for an account he need not (*d*) in general offer to pay the balance, if it be found against him; for the prayer for an account is equivalent to such an offer, and on further consideration the court will decree that he pay such balance (1170).

*Of Accounts against the Mortgagor, and of the Rents and Profits.*

**1486.** The mortgagee is entitled to an immediate account (*e*) of his principal, interest and costs, and to have a day fixed for payment or foreclosure; and a suit in which relief was sought on other matters, in which he was not interested, and the consideration of which would delay the taking of the accounts, was formerly demurrable for multifariousness (1176).

The production of the security is generally *primâ facie* evidence of the existence of the debt (*f*), and if payment be acknowledged in the usual manner by the deed, and sworn to by the mortgagee, he need not prove the payment of the consideration money by other evidence, even against a purchaser of the estate, especially after some time has elapsed (*g*). But where there are manifest signs of fraud there must be proof of

(*b*) *Endo v. Caleham*, Younge, 306;  
*Drew v. Power*, 1 Sch. & Lef. 192;  
*Lawless v. Mansfield*, *supra*.

(*c*) *Johnson v. Curtis*, 3 Bro. C. C. 266.

(*d*) *Colombian Government v. Rothschild*, 1 Sim. 103; *Knebell v. White*, 2 Y. & C. 20; and see *Parker v. Alcock*, Younge, 361.

(*e*) *Pearse v. Hewitt*, 7 Sim. 471. All monies for which the deed is expressly declared to be a security may be claimed as principal. Per Giffard,

L. J., *Blackford v. Davis*, L. R., 4 Ch. 304.

(*f*) *Piddock v. Brown*, 3 P. Wms. 289.

(*g*) *Holt v. Mill*, 2 Vern. 279; *Hampton v. Spencer*, *id.* 288. In *Godard v. Complin*, 1 Ch. Ca. 119, the court thought such evidence good against a jointress, ten years having passed; but the plaintiff insisting that it was not enough, there was further evidence.

actual payment (*h*). An account stated for the purposes of a security in respect of which the debtor is entitled to the protection of the court, such as a *post obit* security, is not conclusive against him (*i*). And where there is an uncertainty as to the amount of principal due, either because it is shown that the sum mentioned in the security was not advanced, but that only a running security was intended to be made (*k*); or by reason of the making of further advances (*l*), an inquiry may be directed to ascertain the amount lent, under or on the credit of the mortgage security, and if there be no evidence of the amount really lent, the mortgagor will be charged to the extent of his own admissions only (*m*) (699).

1487. Entries in the books of a deceased person, who was the solicitor of the mortgagor, at the date of the mortgage, to the effect that he had received the money and had paid it over to the mortgagor, are admissible (*n*) as evidence of payment of the mortgage money: even though the result of taking those items into account between the mortgagor and the solicitor was to leave the latter to a slight amount the creditor of his client; the entry being considered upon the whole to be against the solicitor's interest.

1488. In the case of a mortgage, given to a solicitor by his client to secure the amount of a bill of costs, the court will assume, after several years have elapsed, that the business charged for was actually done; but the peculiar jealousy with which it watches such transactions will cause it to direct an inquiry as to the fairness of the charges, although at the time of executing the security the client had assented to the bill (*o*).

(*h*) *Piddock v. Brown*, 3 P. Wms. 289; see as to proving consideration for a bond debt, *Whitaker v. Wright*, 2 Hare, 310.

(*i*) *Tottenham v. Green*, 32 L. J., N. S., Ch. 201.

(*k*) *Melland v. Gray*, 2 Y. & C. C. 199; see S. C. 5 Jur. 1004.

(*l*) *Gordon v. Graham*, 7 Vin. Abr. 52, pl. 3.

(*m*) *Melland v. Gray*, *supra*.

(*n*) *Clark v. Wilmot*, 1 Y. & C. C. 53; 2 *id.* 259, note. The same laid down by Holt, C. J., of a scrivener's book, but not in favour of the scrivener himself. So of the book of the bursar of a college. (*Smartle v. Williams*, *Comberbach*, 249.)

(*o*) *Wragg v. Denham*, 2 Y. & C. 117.



And where money has been lent by the attorney to the client, the security is not conclusive proof of the actual advance, which must be proved by other evidence (*p*).

**1489.** An account of profits received *pendente lite* will not be directed by the court in favour of judgment creditors (*q*) against the original debtor and owner of the estate, upon setting aside a fraudulent conveyance; the principle with respect to such creditors being merely to remove the obstruction from their way, so as to leave the estate free for them.

**1490.** The rents and profits received by the heir, being part of the assets of the ancestor, against which the judgment creditors could have had judgment at law, they are entitled to an account of them against the heir in equity (*r*).

**1491.** The right of the legal mortgagee is to take possession (715); and so long as he abstains from doing so, neither the mortgagor, remaining in possession (*s*), nor his assignees in bankruptcy, nor a person holding under a mere voluntary trust for the mortgagor, and whose possession may therefore be considered to be that of the mortgagor (*t*), is bound to account to the mortgagee for the rents (1510). And this rule applies not only to the case of a mortgage in fee, but also to a security upon a term (*u*), or an estate for lives (*x*); precluding any account, though the term have expired, or the lives dropped; and as well to the owner of an estate in possession, keeping down the interest of charges on the estate (*y*) as to an ordinary mortgagor (611). And the mortgagee of a rent-charge,

(*p*) *Lewes v. Morgan*, 3 Y. & J. 394; 5 Price, 42; 8 Bligh, 811; *Lawless v. Mansfield*, 1 Dru. & War. 557; *Gresley v. Moulsey*, 8 Jur., N. S. 320.

(*q*) *Higgins v. York Buildings Co.*, 2 Atk. 107; and see 10 Hare, 43.

(*r*) *Higgins v. York Buildings Co.*, *supra*.

(*s*) *Drummond v. Duke of St. Albans*, 5 Ves. 438; *Wilson, Exp.*, 2 Ves. & B. 252; *Higgins v. York Build-*

*ings Co.*, *supra*; *Calwell, Exp.*, 1 Mol. 259.

(*t*) *Hele v. Lord Bexley*, 20 Beav. 127; *Flight v. Camac*, 4 W. R. 654, L. C.; 25 L. J., N. S., Ch. 654.

(*u*) *Gresley v. Adderley*, 1 Sw. 573.

(*x*) *Coleman v. Duke of St. Albans*, 3 Ves. 25.

(*y*) *Earl of Clarendon v. Barham*, 1 Y. & C. C. C. 688.

during the life of a tenant for life, and who has not entered into possession, is not an assign of the mortgagor within the Apportionment Act, and cannot have payment of the arrears of his rent-charge out of the apportioned part of the rents to the death of the tenant for life (*z*).

Nor will the mortgagee out of possession be entitled to the rents paid by the tenants to the receiver in the cause, even after notice given them by the mortgagee; it being first necessary to apply to the court to discharge the receiver (**611**). Nor to growing crops which have been removed by the mortgagor between the time of demand and recovery of possession, unless he can claim them as emblements, under an express contract of tenancy; but he has a right to all crops growing on the premises when he takes possession (*a*).

The mortgagor, on the other hand, can have no allowance for expenditure on the estate (*b*) (**455**).

**1492.** The legal mortgagee who gives notice to the tenant holding under a lease made before or contemporaneously with the mortgage, to pay him the rent, becomes entitled without attornment by the tenant to the rent due at the date of the notice, as well as to that which accrues afterwards (*c*) (**717, 736**). But the mortgagee cannot by such a notice to a tenant whose tenancy commenced after the mortgage, where there is no attornment by the tenant, prevent the mortgagor or his assignee from recovering the rent from the tenant, or cause him to hold of the mortgagee. And the attornment of the tenant will not set up the mortgagee's title by relation to the time of the notice (*d*) (**736**).

In bankruptcy, the legal mortgagee takes the rents (*e*) from the time at which he enters or gives notice to the tenant; or if

(*z*) *Marquis of Anglesey's Estate*,  
Re, L. R., 17 Eq. 283.

(*a*) *Temple, Exp.*, 1 Gl. & J. 216.

(*b*) *Norris v. Caledonian Insurance*  
Co., 17 W. R. 954.

(*c*) *Moss v. Gallimore*, 1 Dougl. 279;  
see 4 Anne, c. 16, s. 9, 10.

(*d*) *Evans v. Elliott*, 9 A. & E. 342;  
*Hickman v. Machin*, 4 H. & N. 716.

(*e*) *Living, Exp.*, 1 Deac. 1; 2 Mont.  
& A. 223; *Barnes, Exp.*, 3 id. 497; 3  
Dea. 223. Payments under licence to  
dig brick earth, held to belong to  
the mortgagee as rent in arrear. (*Hankey*,  
*Exp.*, Mont. & Mac. 247.)

he neither enters nor gives notice, then from the time of sale only, the order for sale not being equivalent to notice.

But as the equitable mortgagee cannot generally take possession, his right to the rent does not arise by notice to the tenant, and is not recognized till the time of the application upon which the order for sale is made. From that time he is entitled to the rent (*f*), even though an inquiry as to the dates of his securities form part of the order (*g*). And if by any means he should get into lawful possession, he will be entitled, as a legal mortgagee under like circumstances, to the rents from the date of his possession (*h*), and he will not be made to refund them upon the granting of the order (*i*).

From the time of the receiver's discharge, or of the application for it, the mortgagee may be considered to be in possession, and to be entitled to the rents (*h*). And when a sequestration has been issued for contempt, the rents received by the sequestrators will be ordered to be paid to mortgagees coming in to be examined *pro interesse suo*, and showing their title; because the sequestrators are officers of the court, and hold for the persons rightfully entitled, and not for the plaintiff (*l*) (657).

If, however, the mortgagee be dispossessed by the mortgagor's collusion with the tenants, and his persuasion to attorn to him, he ought to account for the rents upon coming to redeem (*m*), and the court will restrain him from committing waste (*n*), if necessary, though no injunction be prayed by the bill.

**1493.** An execution creditor is not entitled to rent which became due after the delivery of the writ of elegit, but before inquisition (*o*).

(*f*) Burrell, Exp., 3 Mont. & A. 439; Carlon, Exp., id. 328; 2 Dea. 332; Scott, Exp., 3 Mont. & A. 592; 3 Deac. 304; Bignold, Exp., 2 Mont. & A. 16.

(*g*) Thorpe, Exp., 3 Mont. & A. 441; 3 Deac. 85; Bignold, Exp., 2 Gl. & J. 273; Smith, Exp., 3 M. D. & De G. 680; 13 L. J., N. S., Bank. 21.

(*h*) Bignold, Exp., Postle, Re, 4 Dea. & Ch. 259; 2 Mont. & A. 214; 4 L. J., N. S., Bank. 58.

(*i*) Williams, Exp., 13 W. R. 564.

(*k*) Thomas v. Brigstocke, 4 Russ. 64.

(*l*) Walker v. Bell, 2 Mad. 21; and see cases cited there; Tatham v. Parker, 1 Jur., N. S. 992; 1 Sm. & Gif. 506. See Murtagh v. Tisdall, 2 Ir. Eq. R. 41.

(*m*) Mead v. Lord Orrery, 3 Atk. 235.

(*n*) Goodman v. Kine, 8 Beav. 379.

(*o*) Sharp v. Key, 8 M. & W. 379.

**1494.** The receiver is entitled to rents in arrear at the time of his appointment; but as to the produce of crops shipped to the consignees of the mortgagor, but not converted prior to the appointment of a receiver on behalf of the mortgagee (*p*), the mortgagor is not obliged to give any account of it.

**1495.** The assignee of the security will be bound to allow payments made by the mortgagor to the original mortgagee, after, but without notice of the assignment (*q*); but not payments of principal made to his solicitors, if the solicitors had no special authority to receive such payments (*r*).

If payments be made by a receiver to a mortgagee in excess of the interest to which he is entitled under his security, as against a subsequent incumbrancer, they will not be set against his principal, but will be treated as monies paid to the wrong person, and to be recovered by another proceeding (*s*).

If money be paid by a surety in discharge of a security which afterwards proves to be sufficient, the surety is entitled to be reimbursed (*t*).

*Of Accounts against the Mortgagee and his Assignees.*

**1496.** As a general rule, the *bonâ fide* purchaser of an incumbrance, for less than is due upon it, or than it is worth, whether he be a creditor of the mortgagor (*u*) or a stranger (*v*), is entitled, both against the mortgagor or his heir (*x*) and other incumbrancers (*y*), to be paid all that is due on the purchased security (**1575**): and there is no right against him for an

(*p*) *Codrington v. Johnstone*, 1 Beav. 520; 8 L. J., N. S., Ch. 282. As to the right of prior mortgagees and judgment creditors who have extended a receiver obtained by a puisné incumbrancer under the mortgage and receiver acts in Ireland, to rent in arrear, see *Davoren v. Collins*, 2 Jo. 807; *Coleman v. Mason*, 4 Ir. Eq. R. 421; *Boyd v. Burke*, 8 id. 660; *Moore v. Marquis Donegal*, 11 id. 412.

(*q*) *Williams v. Sorrell*, 4 Ves. 389.

(*r*) *Withington v. Tate*, L. R., 4 Ch. 288.

(*s*) *Law v. Glenn*, L. R., 2 Ch. 634.

(*t*) *Sawyer v. Goodwin*, L. R., 1 Ch. Div. 351.

(*u*) *Morret v. Paske*, 2 Atk. 54; *Darcy v. Hall*, 1 Vern. 49.

(*v*) *Davis v. Barrett*, 14 Beav. 542; *Anon.*, 1 Salk. 154.

(*x*) *Phillips v. Vaughan*, 1 Vern. 336; *Ascough v. Johnson*, 2 Vern. 66.

(*y*) *Morret v. Paske*, 2 Atk. 54.

account of what he has paid for his purchase (*z*). So if the reversioner in fee, not being the original mortgagor of an estate which is subject to several charges, purchase the first for less than is due upon it, he may hold it for all that is due, and the puisné incumbrancers shall have no account against him, nor any equity to make the purchased security stand only for the price which he paid for it (*a*). This rule, which in several earlier cases (*b*) was somewhat differently stated, depends upon the principle (*c*), that the assignee stands in the place of his assignor; and as the latter might have assigned to him *gratis*, it is but just that the measure of the allowance should be what was due, and not what was paid. The assignee taking the hazard, should also have the benefit of the bargain, of which neither the mortgagor, nor any subsequent incumbrancer, can have any equity to deprive him.

**1497.** The rule is, however, different, if the purchaser of the incumbrance be a person, in whom the estate charged with the incumbrance has become vested, subject also to other liabilities of the former owner; as the heir at law, or executor of the latter (*d*): or if he be a person standing in any confidential relation with the mortgagor, by reason of which his

(*z*) It was otherwise by the civil law as altered by the *Lex Anastasiana*, under which an assignee for valuable consideration of a debt or other chose in action, whether secured by mortgage or otherwise, could not recover against the debtor or his estate, for more than the consideration which he paid to the assignor, with legal interest from the time of payment. This law, including the right to compel the cessionary to swear to the amount paid, by which after tender he is bound, is said to prevail in Holland, and as part of the Roman Dutch law is in force in the colony of British Guiana. But it seems not to be applicable where the purchase was made by a puisné incumbrancer. And in the colony the privy council has refused to allow the question of the amount of the consideration paid by a

transferee to be entered into where the purchase was fairly made, and had been recognized judicially in the presence of the mortgagor; holding that the Anastasian law, or any analogous rule, cannot justly be applied to cases free from the taint of unfairness, nor unless it be clearly shown to be applicable. (Colquh. R. C. L. § 1758; 3 Burge, Com. 550; Macrae v. Goodman, 5 Mo. P. C. 315.)

(*a*) Davis v. Barrett, 14 Beav. 542.

(*b*) See Phillips v. Vaughan, 1 Vern. 336; Long v. Clopton, 1 Vern. 464, n.; Williams v. Springfield, id. 476.

(*c*) Anon., 1 Salk. 154; and see Dobson v. Land, 14 Jur. 290; 8 Hare, 216.

(*d*) Braithwaite v. Braithwaite, 1 Vern. 335; Morret v. Paske, 2 Atk. 54.

interest and his duty are in conflict; unless (as is laid down in *Vernon (e)*) the purchaser have bought to protect an incumbrance to which he himself is entitled. Such is the position of a guardian (*f*), trustee (*g*), counsel (*h*) or agent (*i*); the tenant for life also, according to Lord St. Leonards, if he buys a mortgage on the inheritance for less than is due, does so for the benefit of the estate (*j*); and subject to the same equity is the surety (*k*) of the mortgagor: who, being liable upon a contract of indemnity with his principal, is under an obligation, if he can make terms with the creditor, to treat the settlement as a payment of the debt, and to give his principal the benefit of the arrangement. To all these persons, therefore, no more will be allowed in account, than they have paid for the incumbrance, with interest at the legal or current rate, if that be less than the interest reserved (*l*).

**1498.** This equity continues to operate, although the actual employment, or circumstances, which produced the relation of trustee and *cestui que trust*, have ceased to exist; so that the purchaser of an incumbrance, who has stood towards those interested in the estate in the relation of trustee, although he no longer does so, will be allowed no more than he has paid, unless he have entered into a fair contract with the persons interested, that he may become the purchaser; or can show, that there was no fraud or concealment, nor any advantage taken of information acquired in the character of trustee (*m*).

**1499.** A mortgagee, after payment of his mortgage debt,

(*e*) *Darcy v. Hall*, 1 Vern. 48.

(*f*) *Powell v. Glover*, 3 P. Wms. 251, note.

(*g*) *Morret v. Paske*, *supra*; see also *Baskett v. Cafe*, 4 De G. & S. 388.

(*h*) *Carter v. Palmer*, 8 Cl. & Fin. 657.

(*i*) *Hobday v. Peters*, 28 Beav. 349; 6 Jur., N. S. 794; *Morret v. Paske*, *supra*.

(*j*) See *Hill v. Browne*, Dr. 426; 6 Ir. Eq. R. 403.

(*k*) *Reed v. Norris*, 2 My. & Cr. 361; *Rushforth, Exp.*, 10 Ves. 420; *Butcher v. Churchill*, 14 Ves. 567.

(*l*) *Carter v. Palmer*, 8 Cl. & Fin. 657.

(*m*) *Carter v. Palmer*, 8 Cl. & Fin. 857; *James, Exp.*, 8 Ves. 252; *Coles v. Trecothick*, 9 Ves. 247.

has been said (*n*) to be a trustee within this rule, but hardly seems to be within the principle; unless, perhaps, it be a mortgagee in possession, holding over after payment. But though the purchase be made by a person, who, under ordinary circumstances, would be allowed no more than he paid; yet if it were made under the advice of a puisné incumbrancer, who did not disclose the fact that he, and not the purchaser, would reap the benefit of it, the full sum due will be allowed to the assignee (*o*).

1500. Where it was alleged by the mortgagor in his bill, that the assignment was made to the solicitor of the assignor, under an arrangement between the plaintiff and the assignor of the mortgage, so that the solicitor became a trustee for the mortgagor, and the estate redeemable at the price paid by the solicitor, though he had afterwards assigned in consideration of the whole principal money secured by the deed; the court, in the absence of sufficient evidence on the point, gave (*p*) the mortgagor the option of taking an inquiry into the truth of the circumstances under which the assignment was alleged to have been made.

If, upon a sale of the mortgaged estate by the mortgagee, under his power of sale or otherwise, or by the mortgagor, with the mortgagee's consent, it be agreed that the purchase-money shall be received by the latter, in part reduction of the debt; or if it appear from the nature of the transaction that the money was paid to the mortgagee in respect of the mortgage, the payment will be taken (*q*) as against the mortgagee to have been so made, and not to have been made on a general account, between him and the mortgagor. And if the mortgagee have

(*n*) *Baldwyn v. Banister*, 3 P. Wms. 251, n.; but see *Dobson v. Land*, 14 Jur. 288; 8 Hare, 216. According to the report of *Baldwyn v. Banister*, the heir of the mortgagor was to have the benefit of the purchase by the mortgagee of the dower of the mortgagor's widow; but, according to the Reg. Lib. A. 1717, 609, the mortgagee only claimed the sum which he had paid for

the dower, and which was allowed him. It appears, therefore, that the point did not arise.

(*o*) *Bayly v. Wilkins*, 3 J. & L. 630.

(*p*) *Batchelor v. Middleton*, 6 Hare, 75.

(*q*) *Young v. English*, 7 Beav. 10; *Johnson v. Bourne*, 2 Y. & C. C. C. 268.

adopted the mortgagor's contract for sale, the mortgagee as between himself and the purchaser stands in the mortgagor's place, and must bear the loss occasioned by the insolvency of a person to whom the deposit has been paid (*r*). But as between the mortgagee and the mortgagor, if the former have consented to the sale upon the terms that he shall be paid out of the purchase-money, although his execution of the conveyance and signature of the receipt will discharge the purchaser, it will not discharge the mortgagor, if the money be misappropriated by his agent without the mortgagee's default, though the agent may have also acted for the mortgagee (*s*).

Interest paid on money which is afterwards found not to be included in the mortgage will not be taken to have been paid on account of the principal (*t*).

**1501.** Creditors who sell the securities in their hands, and purchase themselves, must take them at the market price of the day; and cannot credit the debtor with less than that price, on the speculation that if the securities had come together into the market, the price would have fallen (*u*).

**1502.** It has been laid down, that in a suit for an account, evidence as to the state of the accounts ought not to be allowed at the hearing, because of the inconvenience of taking an account in part, which ought to be taken altogether on a subsequent proceeding (*x*). But it has been pointed out that such evidence, though inadmissible to prove at the hearing the particulars of the account, may be material to show the right to an account where the defendant has not *in terms* conceded it; for the right is then matter of evidence (*y*).

The court may decide, at the hearing on the certificate and merits, how the account ought to be taken (*z*).

(*r*) *Rowe v. May*, 18 Beav. 613.

(*s*) *Barrow v. White*, 2 J. & H. 580.

(*t*) *Blandy v. Kimber*, 25 Beav. 537.

(*u*) *Stubbs v. Lister*, 1 Y. & C. C. C. 81.

(*x*) *Walker v. Woodward*, 1 Russ. 107; *Law v. Hunter*, id. 100. And *Alderson, B.*, seems to have been inclined, upon these authorities, to reject

evidence at the hearing that an annuitant was not overpaid. (*Knebell v. White*, 2 Y. & C. 20.)

(*y*) *Tomlin v. Tomlin*, 1 Hare, 236, 245.

(*z*) *Burne v. Robinson*, 1 Dru. & War. 688; *Skirrett v. Athy*, 1 Ba. & Be. 433.



In a question as to accounts which had been kept by a creditor in the position of a trustee, but which were always open to the inspection of the debtor, the books were admitted as *prima facie* evidence of the amount of all monies received and paid by the creditor, with liberty to surcharge and falsify (a).

*Of Accounts against the Mortgagee in Possession.*

**1503.** The mortgagee who takes possession of the mortgaged estate is required to be diligent in realizing the amount due on the mortgage, that the estate may be restored (b). He is liable (c) to account for the rents and other profits during his possession (and in taking such an account the Statute of Limitations is no bar (d)), unless he can enter into possession under such an agreement with the mortgagor, for possession at a fixed rent, as the court will uphold (350).

**1504.** The pawnee of a chattel is also bound to render a due account of all the income and profits derived from the pledge (755), where such an account is within the scope of the bailment, as in the case of profits arising from the labour of cattle pledged; being, however, entitled to deduct all necessary costs and expenses. But it is considered that the pawnee is only liable for such profits as he might have, but has not made, when he has neglected an implied obligation to employ the pledge at a profit, as in the case of a ferry-boat or a coach, the employment of which, in the ordinary mode of hire, was contemplated by the parties (e). There appears, however, to be a distinction as to benefits incidentally arising to the pawnee from the possession of the pledge, and not

(a) *Ogden v. Battams*, 1 Jur., N. S. 791.

(b) *Per Turner, L. J.*, Lord Kensington *v. Bouverie*, 7 De G., M. & G. 157; 1 Jur., N. S. 581. As to the different nature of the possession of a person who holds under a receivership deed, see S. C.

(c) *Gould v. Tancred*, 2 Atk. 534; *Langton v. Waite*, L. R., 4 Ch. 402.

And he is bound, if required by the interrogatories in a redemption suit, to set out in his answer such particulars as will sufficiently show the state of the account. (*Elmer v. Creasy*, L. R., 9 Ch. 69.)

(d) *Hood v. Easton*, 2 Jur., N. S. 729.

(e) *Story, Bailments*, § 343.

acquired by its employment for profit, where the pawnee is put to expense in keeping it; for we have already seen that if the pledge be a cow or a horse, the pledgee may take the milk of the one, and may ride the other, by way of recompense (755).

**1505.** A person in possession of an estate under a deed which is in effect a mortgage, accounts as a mortgagee, though the deed under which he holds is in terms a deed of trust (*f*).

**1506.** The representatives of an incumbrancer (being also the trustee), under a deed by virtue of which he was to be in possession, and to apply the rents in payment of the interest and principal of the mortgage debt during a certain period, and then to sell and pay off the residue and hold the surplus upon the trusts of the deed, are only liable to account (in a suit by them for an account and sale and payment of the mortgage debt) as mortgagees in possession during actual possession, and not for rents which the trustee might have received if he had taken possession earlier, though after accepting the trust he had for many years suffered the settlor to receive the rents; but it seems that upon a cross suit by the *cestuis que trust* of the settlement to have the benefit of the trusts, the trustee's estate might have been made liable to the earlier rents also (*g*).

**1507.** A mortgagee is not held to have taken possession merely because he has insured the property, or has asked for without obtaining the rent, if there be no evidence of an act amounting to attornment (*h*).

**1508.** It is in the discretion of the court to grant an inquiry as to the fact of possession, though it is usual to grant it upon the suggestion in the pleadings. The inquiry will be, whether the mortgagee have been in possession of the rents and profits

(*f*) *Chambers v. Goldwin*, 5 Ves. L. J., N. S., Ch. 262.  
834; 9 id. 254.

(*h*) *Ward v. Carttar*, 35 Beav. 171;  
(*g*) *Beare v. Prior*, 6 Beav. 183; 12 L. R., 1 Eq. 29.

as mortgagee, and if he have, the account is directed to be taken against him as such, including wilful default (*i*); and admission of possession, though contrary to the fact, has been held to make him liable to account on that footing (*k*).

**1509.** The mortgagee who gives notice to the tenant not to pay rent to the mortgagor, and yet does not take possession, must answer for any loss arising from his neglect (*l*). He is, however, not bound upon taking possession to enter upon the whole of the mortgaged property; and if he suffer the mortgagor to receive the rent of part, he will not be charged constructively, as if in possession of the whole (*m*).

**1510.** He is subject to account to those who are interested in the equity of redemption, and he cannot by any dealing with the estate discharge himself of this liability (*n*). After receiving notice of a puisné mortgage, the mortgagee in possession becomes liable to account to the puisné incumbrancer for so much of the surplus rent as he has paid to the mortgagor or his representatives; but so long as the mortgagee in possession is without notice, the puisné mortgagee cannot call upon him or the mortgagor for an account of the bygone rents (*o*) (**1491**).

The suit of the puisné incumbrancer, brought to enforce his claim (the prior incumbrancer being made a party), amounts to an equitable possession of the rents, and binds (*p*) the surplus rents in the hands of the prior incumbrancer until the dismissal of the suit, though it be not prosecuted. And the mortgagee must account for whatever he may receive after the order to account (*q*), though the practice is to direct the

(*i*) *Dobson v. Lee*, 1 Y. & C. C. C. 714. But no special direction as to wilful default seems necessary, for accounts are so taken against the mortgagee in possession by the course of the court (**1524**).

(*k*) *Parker v. Watkins*, Johns. 133.

(*l*) *Heales v. M'Murray*, 23 Beav. 401.

(*m*) *Soar v. Dalby*, 15 Beav. 156.

(*n*) *Hinde v. Blake*, 11 L. J., N. S., Ch. 26.

(*o*) *Maddocks v. Wren*, 2 Rep. in Ch. 109; *Berney v. Sewell*, 1 Jac. & W. 647; *Parker v. Calcraft*, 6 Mad. 11; *Archdeacon v. Bowes*, 13 Price, 353, 368.

(*p*) *Parker v. Calcraft*, 6 Mad. 11.

(*q*) *Bulstrode v. Bradley*, 3 Atk. 582.

account without future words. But, it is said, he is not bound to account to a puisné incumbrancer for the profits received after foreclosure, though he had notice of his claim before decree (*r*).

**1511.** As to surplus rents which the mortgagee has paid over to or allowed the mortgagor to receive, before any other creditor commenced proceedings or gave notice of his claim, the mortgagee will be allowed them in account as matter of just allowance, or may have leave to set off any just demand; and no creditor can recover the rents so paid over or received in any subsequent proceeding (*s*).

A mortgagee in possession is chargeable with surplus rents, which, instead of applying in discharge of principal and interest, he has allowed to be received by a married woman, the owner of the estate, for her maintenance, without her husband's permission; but if there be reasonable ground to suppose that on application to the court, such payments would have been ordered or sanctioned, the mortgagee will not be charged with costs, of which none will be given on either side; although, by disallowing the payments, the balance of the account be turned in the mortgagor's favour (*t*).

Where a mortgagee by mistake included in a lease of the mortgaged estate land which was not mortgaged to him, but to another incumbrancer, who concurred in the lease, the latter was held to be entitled to have the rents apportioned, and to an account of a proportion of the back rents (*u*).

**1512.** If the incumbrances be such, that they cannot be made effectual without execution (as in the case of a charge upon an ecclesiastical benefice, which must be perfected by sequestration (**773**)), a subsequent execution creditor is entitled to an account against an earlier, although there be

(*r*) *Bird v. Gandy*, 7 Vin. Abr. 45, pl. 20; 2 Eq. Ca. Abr. 251.

(*s*) *Archdeacon v. Bowes*, 13 Price, 353, 368; *Holton v. Lloyd*, 1 Mol. 30.

(*t*) *Clark v. Cook*, 3 De G. & S. 333.

(*u*) *Harryman v. Collins*, 18 Jur. 501; 18 Beav. 11.

incumbrancers prior to both who have not taken out execution; for their incumbrances, if not proved in the cause, are not recognized by the court; and the owners of them, being unable to take the surplus themselves, are not suffered to keep it against others who have been more diligent (*x*).

**1513.** Where a prior judgment creditor, entitled to possession under writs of *elegit*, agrees with others in possession as to the discharge of his debt, the accounts will not be so taken as to benefit another puisné incumbrancer, and affect the rights of the prior judgment creditor under the agreement, on the ground that the latter, by a subsequent transaction, has precluded himself from getting any further benefit from his writs (*y*).

**1514.** If the guardian of an infant take an assignment of a mortgage on the infant's estate, he must thenceforth account as mortgagee in possession (*z*) (though the original mortgagee had not entered), and not as guardian, for the rents and profits which have been, or might have been, received by him since the assignment. But a solicitor who pays off the mortgage debt of his client will be treated as his agent, and not as mortgagee in possession, though he receive the rents (*a*).

**1515.** As the assignee of a mortgage claiming under an assignment, made without the privity of the mortgagor to the account, will receive from the mortgagor so much only as is due on the security, without reference to what was paid on the assignment, so the mortgagor, upon an assignment so made, loses none of his right to an account of past receipts from the mortgagee (*b*) who has been in possession, though the latter may have accounted with the assignee (1481); nor does the mortgagee get rid of his liability to future accounts, but may be decreed to account, both before and

(*a*) Cuddington v. Withy, 2 Sw. 174.

(*y*) Hele v. Lord Bexley, 17 Beav. 14.

(*z*) Bishop v. Sharp, 2 Vern. 469;  
per Sir N. Wright.

(*a*) Ward v. Carttar, L. R., 1 Eq.  
29; 35 Beav. 171.

(*b*) Venables v. Foyle, 1 Ch. Ca. 2;  
1 Eq. Ca. Abr. 328.

after the assignment: which seems to have been put upon the reason that the mortgagee must be responsible for the person to whom he assigns the mortgagor's estate. It has been doubted, whether, if the mortgagor hide so that he cannot be served with process in a foreclosure suit, the mortgagee should be answerable after assignment (*c*).

1516. Where the creditor is in possession of the debtor's estate, as receiver under his power of attorney, and afterwards becomes mortgagee of the same estate, he will not necessarily be charged as a mortgagee from the time of his becoming so: but must still account (*d*), and be entitled to allowance as a receiver, during the subsistence of the trusts for which the power was executed.

1517. The tenant for life being bound to keep down the interest upon mortgages (*e*) (1558), the accounts will be taken as against his assignee on the footing, that as such assignee he was bound to keep down the interest of the incumbrances affecting the inheritance, which were vested in him, out of such rents as he had received (*f*): but during the life estate the assignee is not liable to account as a mortgagee in possession (*g*).

1518. An account of profits will be directed back in favour of the owner of an estate, from whom a fraudulent conveyance has been obtained, such account however being liable to be limited to the time of filing the bill if the owner have not been diligent in asserting his right (*h*).

1519. It has been held in Ireland (*i*), that the *elegit* cre-

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|---|---|
| ( <i>c</i> ) Venables <i>v.</i> Foyle, 1 Ch. Ca. 2;   | those in remainder.                               |
| 1 Eq. Ca. Abr. 328.                                   | ( <i>g</i> ) Whitbread <i>v.</i> Smith, 3 De G.,  |
| ( <i>d</i> ) Lord Trimleston <i>v.</i> Hamill, 1      | Mac. & G. 727.                                    |
| Ba. & Be. 377.  | ( <i>h</i> ) Mulhallen <i>v.</i> Marum, 3 Dru. &  |
| ( <i>e</i> ) Blake <i>v.</i> Foster, 2 Ba. & Be. 387. | War. 317.   |
| ( <i>f</i> ) Incorporated Society <i>v.</i> Richards, | ( <i>i</i> ) McDonnell <i>v.</i> Walshe, 2 Dru. & |
| 1 Dru. & War. 258. In this case the                   | War. 252; see Shaw <i>v.</i> Murtagh,             |
| assignee was holding over adversely to                | Hayes, 586.                                       |

ditor in possession is not bound to account as a mortgagee in possession at the suit of a judgment creditor, who has not sued out an *elegit* and has given no notice of his claim to the creditor in possession; but that he shall only account from the commencement of the suit. But where the debtor, or his representative (being persons in privity with the estate), seeks an account from the *elegit* creditor, the latter shall account (*k*) for all that he might have received without wilful default.

So, in England, where an *elegit* creditor came under 1 & 2 Vict. c. 110, s. 13, for a sale of the estate, he was compelled to submit to account as a mortgagee in possession (*l*), as the price of the relief sought (*m*), although Lord Hardwicke's remark, that equity would oblige the judgment creditor (*n*) to account for the whole that he *had* received, was cited as a proof that no further account could be had against him; and although the general liability of the judgment creditor to account as a mortgagee in possession was doubted by Sir Anthony Hart (*o*).

To avoid circuity a judgment creditor, who gets into possession as assignee of a term of which he is a trustee for the debtor, and not under an *elegit*, may set off the rents and profits which he has received, against the amount due to him in respect of his judgment debt; but he will be charged as mortgagee in possession (*p*).

Where a judgment creditor in possession has obtained assignments of several judgments, the rents are to be applied, first in discharge of the interest, and then of the principal of the judgment debt, in respect of which he took possession, and then in discharge of the principal and interest of the several judgments

(*k*) *O'Brien v. Mahon*, 2 Dru. & War. 306.

(*l*) *Bull v. Faulkner*, 1 De G. & S. 685; 17 L. J., N. S., Ch. 23.

(*m*) Account of the sum due to the plaintiff for principal, interest and costs, on his judgment debt [*or, where the judgment creditor is an assignee, on foot of the judgment obtained by A. against B.*], and of all sums received by him, or by his order, or for

his use, in respect of the rents and profits of the lands, whereof possession had been delivered to him by the sheriff [*or from and out of the real and personal property of the judgment debtor*], or which, without his wilful default, might have been received.

(*n*) *Godfrey v. Watson*, 3 Atk. 517.

(*o*) *Holton v. Lloyd*, 1 Mol. 30.

(*p*) *Hele v. Lord Bexley*, 17 Beav. 14.

in succession, and not of the interest on all the judgments, before payment of the principal of any of them (*q*).

**1520.** An equitable mortgagee, by deposit, may have an account against the Crown of rents and profits received under an extent (*r*) (**850**). The inquiry will be, who has received the rents and profits of the estate since the same was seized into the hands of her Majesty, under the writ of extent against A. B., and by what authority and to what amount, and what has become thereof.

**1521.** If it be sought to charge the mortgagee in possession with an occupation rent it ought to appear (*s*) on the pleadings, that he has been in actual possession of the whole, or some part of the estate; the mere allegation of possession not being sufficient, unless it appear that he was in possession under a claim of absolute ownership; in which case (*t*) an occupation rent is directed as of course. The direction will be prefaced by an inquiry (*u*) as to the fact of occupation, and the occupation rent will be fixed according to the value which the estate is proved to be worth; but no rent will be charged during such time as the property from its ruinous state, or for any other reason, is incapable of making any return (*x*).

**1522.** Under the prayer for general relief, the plaintiff is entitled to an account of rents and profits received, though it be not specially asked, if the statements in his pleadings be sufficient to sustain such a prayer (*y*); but where more than one person has been in possession, and the plaintiff prays expressly for an account against the last of them only, especially if he state that the whole or almost all of the mortgage debt and interest has been discharged by rents received by him, some

(*q*) *Skirrett v. Athy*, 1 Ba. & Be. 430; see *Montgomery v. Donohoe*, 5 Ir. Ch. R. 495; *Kirby v. O'Shee*, 1 Jo. 565.

(*r*) *Casberd v. A.-G.*, Dan. 238; 6 Pr. 411.

(*s*) *Trulock v. Robey*, 15 Sim. 273; see *Fee v. Corbine*, 11 Ir. Eq. R. 406.

(*t*) See *Smart v. Hunt*, 1 Vern. 418, note.

(*u*) Set. Dec. 225, ed. 2; 468, ed. 3.

(*x*) *Marshall v. Cave*, 3 L. J., Ch. 57.

(*y*) *Parker v. Alcock, Younge*, 361; *Trulock v. Robey*, 15 Sim. 265.



inference arises that against the other the account was meant to be waived. And it has been doubted (*z*) whether the prayer for general relief would give a right, in such a case, to an account against the person who was first in possession.

**1523.** After redemption, the mortgagor cannot recover from the estate of the deceased mortgagee, under the common prayer in a creditor's suit, sums claimed in respect of the profits of the estate during the mortgagee's possession, even though at the date of the order for redemption the mortgagor was ignorant of the subject of the claim. The only remedy in such a case is to take proceedings to correct the decree (*a*).

*Of the Manner of charging the Mortgagee in Possession and of Allowances to the Mortgagee.*

**1524.** The account usually directed against the mortgagee in possession either of tangible property or of a business (*b*) is of what he has, or without wilful default might have, received from the time of his taking possession. This, it has been said, is the only instance in which the court directs an account in this form without any special case made for the purpose (*c*); although a purchaser, whose purchase has been set aside and ordered to stand as a security, is within the rule (*d*). The mortgagee, however, will not be subject to such an account, unless it be shown, not merely that he was in possession, but that he was so in the character of mortgagee. If he enter and receive the rents as tenant for life of the equity of redemption (*e*), or under an agreement of tenancy, or in the real or supposed character of purchaser, or otherwise do not assume to receive them as mortgagee in possession, he will not be liable to this form of account (*f*).

(*z*) *Trulock v. Robey*, *supra*; and see *id.* 283, note.

(*a*) *Shoobridge v. Woods*, 8 Jur. 27.

(*b*) *Williams v. Price*, 1 Sim. & S. 581; see *Chaplin v. Young*, 33 Beav. 330. As to his position, if he becomes a partner in the business, see Lord Eldon's remarks in *Rowe v. Wood*,

2 J. & W. 556, 558.

(*c*) Per Turner, L. J., *Kensington v. Bouverie*, 7 De G., M. & G. 156; 1 Jur., N. S. 581.

(*d*) *Adams v. Sworder*, 2 De G., J. & S. 44.

(*e*) *Kensington v. Bouverie*, *supra*.

(*f*) *Page v. Linwood*, 4 Cl. & Fin. 399; *Parkinson v. Hanbury*, L. R., 2

So where a person got into possession under a forfeiture, and not as mortgagee, and held without complaint or claim for several years, and was dealt with by persons who had acknowledged that their rights were gone, and had accepted his bounty; the court refused to entertain a suit by such persons seeking to charge the possessor as mortgagee (*g*).

**1525.** The mortgagee is not usually required (*h*) to account for more than he has received, or according to the actual value of the land; unless it can be proved, that but for his gross default, mismanagement or fraud, he might have received more.

Such may be evidenced by his refusal or removal of a sufficient tenant (*i*), who offered or paid a certain rent; his refusal, in combination with the tenant (*k*), to receive the rent, or to take out execution on a judgment in ejectment; or his making an improper use of his security, by suffering the mortgagor himself to take the profits (*l*), to the prejudice of his other creditors, or, where he is bankrupt, of his trustee.

But in these cases the proof must be distinct. The mortgagor is not suffered to bring in the mortgagee, and ask him how much rent he could have got, when in possession, nor to involve him in a minute inquiry (*m*), whether some person was ready, unknown to him, to have given more rent for the estate; and the mortgagee may even be excused for refusing a higher offer from a sufficient person; as if the tenant in possession be in arrear, and by removing him the arrear might have been lost. And it is the duty of the mortgagor, if he have the opportunity, to give notice to the mortgagee, that the estate can be made, and to assist him in making it, more productive; which if he omit to do, and lie by, making no objection to the mortgagee's

E. & I. App. 1, distinguishing *Neesom v. Clarkson*, 2 Hare, 163.

(*g*) *Blennerhassett v. Day*, 2 Ba. & Be. 104, 125.

(*h*) *Anon.*, 1 Vern. 45; *Hughes v. Williams*, 12 Ves. 493; *Wragg v. Denham*, 2 Y. & C. 117; 6 L. J., N. S., Eq., Ex. 38.

(*i*) *Anon.*, 1 Vern. 45.

(*k*) *Duke of Bucks v. Gayer*, 1 Vern. 258.

(*l*) *Chapman v. Tanner*, 1 Vern. 267; *Coppring v. Cooke*, id. 269; and see 2 Sch. & Lef. 656.

(*m*) *Metcalf v. Campion*, 1 Mol. 238; *Hughes v. Williams*, 12 Ves. 493; *Brandon v. Brandon*, 10 W. R. 287.

proceedings, he cannot afterwards charge him with mismanagement.

**1526.** The mortgagee in possession accounts for rent, after the rate which has been reserved. But if fraud or wilful default be shown by the other party, it will be for the mortgagee to prove that no tenant offered, or could be had, with reasonable diligence. Any act to prevent the letting, to which the mortgagor was a party, will be an answer to the charge of wilful default (*n*).

The price at which the mortgagor proves the estate to have been let, whilst in the hands of the mortgagee, will be taken (*o*) to be the rate at which it was let during the whole time of his possession, unless he show the contrary.

Where a lease made by the mortgagor to the mortgagee has been set aside (**350**), the mortgagee will not be charged with a higher rent than that reserved by the lease (*p*) if the circumstances were such that no higher rent could be obtained. And if a fair rent have been reserved on such a lease, the mortgagee will be charged (*q*) in account with the rent, as it became due, till the first day of payment after the filing of the plaintiff's bill, and from that time at a fair rent to be fixed by the court.

**1527.** The mortgagee will be allowed monies paid for the redemption of land tax (*r*), and for the renewing of leases upon which the estate is held, though there be no covenant by the mortgagee to renew (*s*), as well as what he has expended for the preservation of the estate, as for head rent, or in preserving the property from deterioration (*t*), or in sup-

(*n*) *Trimleston v. Hamill*, 1 Ba. & Be. 385; *Metcalf v. Champion*, 1 Mol. 238.

(*o*) *Blacklock v. Barnes*, Sel. Ch. Ca. 53.

(*p*) *Gubbins v. Creed*, 2 Sch. & Lef. 214.

(*q*) *Webb v. Rorke*, 2 Sch. & Lef. 661.

(*r*) *Knowles v. Chapman*, Set. Dec. 226, ed. 2; 467, ed. 3.

(*s*) *Woolley v. Drag*, 2 Anst. 551; 5 Bac. Abr. 736; *Manlove v. Bale*, 2 Vern. 84; *Lacon v. Mertins*, 3 Atk. 4. But he cannot compel the mortgagor to renew.

(*t*) *Burrowes v. Molloy*, 2 Jo. & Lat. 521; *Brandon v. Brandon*, 10 W. R. 287.

porting the mortgagor's title to the estate, where it has been impeached, or otherwise doing what is essential to protect the mortgagor's title (*u*), or to make his own title good against the mortgagor, at law or in equity, or in taking out administration to the mortgagor to secure himself, in case he were defeated at law (*x*). Money laid out in perfecting the mortgagee's title, as in payment of the fines and fees upon admission to copyholds, and the costs of procuring a (necessary) Act of Parliament will also be allowed to the mortgagee, and so will premiums due to an insurance office (being mortgagees) which the mortgagor has agreed but failed to pay (*y*), and all such monies will be added to the principal debt, and like it will carry interest (1554).

**1528.** But money paid for insuring the mortgaged property against fire will not be allowed, (except under the statutory provision hereafter noticed,) whether the mortgagee were in possession or not; unless the insurance were effected and continued, in conformity with the provisions of the mortgage deed; for the mortgagee is entitled, as between himself and the mortgagor, to make and have the benefit of any contract which does not affect the mortgaged property; and not being liable to account to the mortgagor for the insurance money, he cannot without express contract charge the estate with the premiums (*z*).

(*u*) *Godfrey v. Watson*, 3 Atk. 517; *Sandon v. Hooper*, 6 Beav. 246; 12 L. J., N. S., Ch. 309. See *Blackford v. Davis*, 17 W. R. 337. As to the construction of a provision in a colonial security, that certain payments by the mortgagee for licences, fees and other charges should be a charge upon the estate, see *Fenton v. Blackwood*, L. R., 5 P. C. 167.

(*x*) *Lomax v. Hide*, 2 Vern. 185; *Ramsden v. Langley*, id. 536. But not costs of defending his title to the mortgage against a third person. (*Parker v. Watkins*, 2 Johns. 133.)

(*y*) *Earl Fitzwilliam v. Price*, 4 Jur., N. S. 889, and see *Brown v. Price*, id.

882. But the premiums will be disallowed if the insurance be not actually effected by the office. (*Grey v. Ellison*, 1 Gif. 438; 2 Jur., N. S. 511.) In the Court of Admiralty the rule as to charges for wages, towage and pilotage is that neither the owner nor the bondholder will be allowed them, unless they were paid with the sanction of the court, which may be had without instituting a suit. (*Janet Wilson*, Swab. 261; *Cornelia Henriette*, L. R., 1 Ad. 51; *Fair Haven*, id. 67.)

(*z*) *Dobson v. Land*, 8 Hare, 216; 14 Jur. 288; 19 L. J., N. S., Ch. 484; *Bellamy v. Brickenden*, 2 Jo. & H. 137. Premiums disallowed against a

But by a modern statute, the person to whom any principal money, secured or charged by deed on any hereditaments, shall for the time being be payable, his executors, administrators and assigns, are empowered (unless the power be negatived by express declaration in the security, and subject to any variations or limitations therein contained), at any time after any omission to pay any premium on any insurance, which by the terms of the deed ought to be paid by the person entitled to the property subject to the charge, to insure and keep insured from loss or damage by fire the whole or any part of the property, whether affixed to the freehold or not, which is in its nature insurable, and to add the premiums paid for any such insurance to the principal money secured, at the same rate of interest as if the power had been in terms conferred by the person creating the charge (*a*).

If the mortgagor and mortgagee effect a joint insurance on the mortgaged estate, the mortgagee paying the premiums, and on the premises being destroyed by fire, the mortgagor's assignees procure payment from the company, they will be ordered to pay it into court, though they have already paid it to the account in bankruptcy; there being no right in one of the parties in respect of a joint security to apply the produce, irrespective of the claims of the other party (*b*).

**1529.** So long as the equity of redemption remains with the mortgagor, he is bound to indemnify the estate against expenses incurred in protecting the title (*c*); and even where the equity

puisé mortgagee. (*Brooke v. Stone*, 34 L. J., N. S., Ch. 250.) The premiums were allowed in the case first cited upon a subsequent occasion by Knight Bruce, V.-C.; not, it appears, upon any ground inconsistent with the principle stated above, but on the consideration that the insurances were effected, so far as circumstances would permit, in accordance with the covenants contained in the mortgages. (*Dobson v. Land*, 4 De G. & S. 575.) In *Scholefield v. Lockwood*, the M. R., notwithstanding these authorities, is

said to have allowed fire insurance premiums under "just allowances." The decree was reversed on other points. (9 Jur., N. S. 738, 1258.)

(*a*) 23 & 24 Vict. c. 145, ss. 11, 32; and see sect. 34, limiting the power to transactions subsequent to the statute, and to mortgages or charges to secure loans on existing or future debts.

(*b*) *Rogers v. Grazebrook*, 12 Sim. 557.

(*c*) *Langton v. Langton*, 18 Jur. 1092; *Phené v. Gillan*, 5 Hare, 1.

has passed into the hands of an assignee, expenses so incurred, if the mortgagee remain passive, will not fall upon the estate (*d*); though the mortgagee have been made a party, and the result is advantageous to him.

**1530.** The mortgagee in possession is bound to act as a provident owner, and he will be liable for wilful default if, being in possession under a mortgage of unfinished leasehold buildings, he neither sells the property nor completes the buildings, whereby the leases are forfeited (*e*). But he is not obliged to incur the cost and risk of defending a doubtful right to the possession of the property of other persons which he has distrained for rent, after a threat of proceedings to recover it (*f*). So the mortgagee of a debt is liable for its loss if it becomes irrecoverable by his wilful default (*g*).

He will not be charged with deterioration of the property arising from ordinary decay by time, nor even from want of repair, which has caused a diminution in the annual value; and it has been said that he ought not to be charged with the same degree of care, which a man is supposed to take who keeps possession of his own property. But he ought to do such repairs as he can pay for out of the rents received after his interest is paid (*h*); and if there be gross or wilful negligence, the mortgagee will be held responsible (*i*). He will therefore be liable for the loss occasioned by alterations, injurious to the value of the estate, such as the pulling down of cottages and the cutting of timber, being chargeable with the value thereof with interest (*h*).

(*d*) *Langton v. Langton*, 18 Jur. 1092; 1 id. N. S. 1078.

(*e*) *Perry v. Walker*, 24 L. J., N. S., Ch. 319; 1 Jur., N. S. 746; 3 Eq. R. 721, appealed on other points.

(*f*) *Cocks v. Grey*, 1 Gif. 77; 3 Jur., N. S. 1115; 26 L. J., N. S., Ch. 607.

(*g*) *Williams v. Price*, 1 S. & S. 581.

(*h*) *Richards v. Morgan*, 4 Y. & C., Appendix, 570.

(*i*) *Russel v. Smithies*, 1 Anst. 96; Seton, 398, ed. 3.

(*h*) *Sandon v. Hooper*, 6 Beav. 246; *Gubbins v. Creed*, 2 Sch. & Lef. 214. Inquiry whether deterioration had arisen from the gross negligence of the mortgagees, from want of proper repairs and want of cultivation. (*Wragg v. Denham*, 2 Y. & C. 117.) Whether the mortgagee, to the damage and injury of the mortgagor, allowed the buildings to fall down. (*Batchelor v. Middleton*, 6 Hare, 75.) No injunction against a mortgagee to stay waste committed by other persons, under an

**1531.** The mortgagee in possession, who without special authority opens mines or quarries, will be charged with his receipts, but will not be allowed the costs of severing the produce or other expenses; for he has no right to speculate at the mortgagor's expense, and the act is a sale of part of the inheritance (*l*). But a mortgagee with an insufficient security may open new, or may lease or work abandoned mines, and will be only liable to account for the profits or royalty, and not for the value of the ore raised or the damage caused to the surface (*m*). And if he be specially authorized to work the mines, he will be allowed the expenses incurred in doing so, with interest (*n*). If the mortgagee come into possession of open mines, he cannot be called upon to speculate by working them, however likely it may be that the mines will be improved by a large expenditure (*o*). He is not bound to advance more than a prudent owner, and cannot be charged with mismanagement if he omit to do so.

If there be reason to think that mines have been recklessly worked with a view to undue profit, so as to leave them unfit for further working without a great outlay, the court will direct an inquiry (*p*) as to the manner of working them, and as to their condition; even it seems if no suggestion as to undue working be made by the bill. Under an inquiry whether the mortgagee has expended any and what sums of money in necessary repairs and lasting improvements, it may be found that he has opened and worked mines (*q*) (**1554**).

**1532.** The mortgagee in possession need not rebuild ruinous premises, or increase his debt by laying out large sums beyond

alleged custom and without his permission, the facts being shown, though the mortgagee made no affidavit. (Anon., 1 L. J., Ch. 119.)

(*l*) *Hughes v. Williams*, 12 Ves. 493; *Thornycroft v. Crockett*, 16 Sim. 445; see *Hood v. Easton*, 2 Gif. 692; 2 Jur., N. S. 729, where mortgagee, without authority to work mines, authorized strangers to work them; doubted on appeal, 2 Jur., N. S. 917.

See as to brickmaking, Set. 398, ed. 3.

(*m*) *Millett v. Davey*, 9 Jur., N. S. 92; 31 Beav. 470; 32 L. J., Ch. 122.

(*n*) *Norton v. Cooper*, 25 L. J., Ch. 121.

(*o*) *Rowe v. Wood*, 2 J. & W. 555.

(*p*) *Mulhellen v. Marum*, 3 Dru. & W. 317.

(*q*) *Thornycroft v. Crockett*, 16 Sim. 445.

the rent (*r*). On the other hand, he will be allowed for proper and necessary repairs to the estate (*s*); and if buildings are incomplete or become ruinous, so as to be unfit for use, he may complete or pull them down and rebuild as well in ordinary cases for the preservation of his security (*t*), as, where the tenure is copyhold, to prevent the lord from entering for the forfeiture (*u*). And the rebuilding or repairing may be done in an improved manner, and more substantially than before (*x*), so that the work be done providently, and that no new or expensive buildings be erected for purposes different from those for which the former buildings were used; for the property when restored ought to be of the same nature as when the mortgagee received it; and if it be thus wholly, or in part, converted from its original purposes, the money expended will not be allowed to be charged upon it (*y*). This right of the mortgagee is founded upon the principle that the mortgagor, whose right is only equitable, must repay all that is equitably due; and it does not necessarily belong to the owner of a mere rent-charge, against whom the owner of the estate may recover possession on satisfaction of the charge, by the exercise of a mere legal right (*z*).

**1533.** It is also the duty of the mortgagee to inform the mortgagor, as soon as possible, of the necessity for incurring extraordinary expenses. And whenever the works done amount to improvements, though of a lasting kind, the mortgagee in possession may hardly be said to be safe (*a*), unless he get the consent or acquiescence, on notice, or by approval

(*r*) *Richards v. Morgan*, 4 Y. & C. App. 570; *Moore v. Painter*, 6 Jur. 903.

(*s*) *Godfrey v. Watson*, 3 Atk. 518; *Sandon v. Hooper*, 6 Beav. 246.

(*t*) *Newman v. Baker*, Finch, 38; *Marshall v. Cave*, 3 L. J. Ch. 57. For form of inquiry, see *Seton*, 396, ed. 3.

(*u*) *Hardy v. Reeves*, 4 Ves. 466.

(*x*) *Marshall v. Cave*, *supra*.

(*y*) *Moore v. Painter*, 6 Jur. 903.

And see *Jortin v. South Eastern Railway Co.*, 2 Sm. & G. 48; 6 De G., M. & G. 270; reversed on other points, 6 H. L. C. 440.

(*z*) *Hooper v. Cooke*, 20 Beav. 639; 25 L. J., N. S., Ch. 62, 467.

(*a*) *Trimleston v. Hamill*, 1 B. & Be. 385; *Sandon v. Hooper*, 6 Beav. 246. The Court of Bankruptcy will on petition give leave to make improvements and to add the costs to the debt. (*Smith*, Exp., 3 Mont. & A. 63.)



of the accounts, of the persons interested in the equity of redemption.

It is clear (*b*) that he will not be allowed for such improvements, made on his own authority, as are not necessary to preserve, though they may increase, the value of the estate; for, if it were not so, a weapon would be put in the mortgagee's hands with which he might greatly clog the right of redemption; which he has no right to make more expensive than is necessary to keep the estate in good repair, and to protect the title. But if the objection that the repairs and improvements were unnecessary and improper, be not raised on the pleadings by the mortgagor in a redemption suit, the mortgagee will be entitled to the ordinary direction for allowance of necessary repairs and lasting improvements (*c*), he, it seems, being also bound to raise the question on the pleadings, and to give general evidence at the hearing, of the alleged outlay (*d*).

He may, however, be entitled to the value of improvements, which he has made under the belief that he was absolute owner (*e*); and so may a person who has been in possession as owner (*f*), under a deed which is afterwards set aside for fraud or held to be a contract for a redeemable interest (*g*). Where the tenant for life of lands subject to a mortgage, paid off the mortgage, and took an assignment, and improved the estate (*h*), upon redemption he had no allowance for improvement before he took the assignment, being then in as a tenant for life: from the assignment he was allowed two-thirds of the value of lasting improvements, but not the other third, because he had the benefit during his life; and no interest was allowed during his life, because tenant for life must keep down the interest during his life. And a tenant for life who makes improvements at his own discretion, or with the consent of

(*b*) *Sandon v. Hooper*, 6 Beav. 246.

(*c*) *Powell v. Trotter*, 1 Dr. & Sm. 388; *Moore v. Painter*, 6 Jur. 903.

(*d*) See *Sandon v. Hooper*, 6 Beav. 246; *Pelly v. Wathen*, 7 Hare, 351.

(*e*) *Thorne v. Newman*, Finch, 38. And see *Swan v. Swan*, 8 Price, 518, as to the right upon partition of a part-

owner who has improved.

(*f*) *Mulhallen v. Marum*, 3 Dru. & War. 317.

(*g*) *Fee v. Cobine*, 11 Ir. Eq. R. 406.

(*h*) *Newling v. Abbot*, Vin. Abr. Account (D. a.), 8, p. 185; 2 Eq. Ca. Abr. 596.

the trustees, is not generally entitled to have them out of the *corpus* (*i*).

To entitle the mortgagee to an inquiry, as to money laid out in lasting improvements, he need not prove at the hearing what precise sums were so laid out; yet no inquiry will be granted on his bare allegation, without evidence that he has laid out money for the purpose (*j*). If a tenant for life make repairs, which are not of a nature to justify the expense of an inquiry, none will be directed, and the cost will not be charged upon the inheritance, though the tenant for life was not bound to make the repairs; but it seems that it would be otherwise if the sum expended were very large, or a case of wilful default by the former tenant for life were made out (*k*).

Where a mortgagee of copyholds, having got into possession by ejectment pending a foreclosure suit, made lasting improvements after the suit was set down for hearing, an inquiry as to the improvements was ordered after decree on petition (*l*).

In estimating the value of improvements, where there has been rebuilding, it will be ordered (*m*), that the old buildings be valued as old materials only, if they were incapable of repair; otherwise as buildings standing.

The words "all just allowances," in a decree, cover all payments to which the mortgagee is entitled under the terms of his security (*n*). They do not authorize (*o*) an allowance for improvements, but the decree must particularly mention them, which it never does unless there be laid before the court some evidence that improvements have been made.

The mortgagee will of course be allowed the expenses of

(*i*) *Dixon v. Peacock*, 3 Drew. 288.

(*j*) *Sandon v. Hooper*, 6 Beav. 246. It is, however, said to have been done in another case "at the request" of the mortgagees. (*Johnson v. Bourne*, 2 Y. & C. C. 278.) Account of beneficial improvements, of expenses of planting trees and orchards, or so much thereof as are in good condition and of benefit to the plaintiff. (*Gubbins v. Creed*, 2

Sch. & Lef. 214.)

(*k*) *Sharshaw v. Gibbs*, Kay, 333—337.

(*l*) *Spurgeon v. Witham*, 21 Dec. 1855, M. R.

(*m*) *Robinson v. Ridley*, 6 Mad. 2.

(*n*) Per Selwyn, L. J., *Blackford v. Davis*, L. R., 4 Ch. 304.

(*o*) *Knowles v. Spence*, Mos. 226; *Murphy v. Meade*, 1 Jo. 620.

sales and of receiving the purchase-monies in accounting for such purchase-monies.

And if he pay (*p*) the out-going tenant, even after the completion of the accounts, for crops in the ground or other particulars from which the mortgagor will receive benefit, the amount will be allowed him; though the payments were made under an agreement or in pursuance of an arbitration not binding upon the mortgagor: an inquiry being directed, if necessary, as to the proper amount to be allowed; and regard being had to the custom of the country.

**1534.** The cost of repairs to the mortgaged property, done by order of the mortgagee in possession, constitutes a debt payable by his executrix out of his general estate, and is not chargeable to the legatee of the mortgage debt (*q*).

**1535.** The mortgagee may agree with the mortgagor for the appointment of a receiver to be paid by the latter (*r*), or may appoint one under the statute (591).

It was laid down during the existence of the usury laws, that neither the mortgagee, nor his assignees or executors, nor a trustee for the mortgagor's creditors, could have any allowance for personal care or trouble in receiving the rents of the estate, notwithstanding an agreement with the mortgagor for that purpose; even where before the existence of the present statutory power he might have appointed a receiver; viz., where from the nature of the property so much time and trouble would be sacrificed by personal receipt of the rents, that a provident owner whose time was of value would probably have appointed one (*s*) (1539).

Nor will the mortgagee be allowed the commission for receiving rents which would have been payable under the

(*p*) *Oxenham v. Ellis*, 18 Beav. 593.

(*q*) *Gibbon v. Gibbon*, 17 Jur. 416; 13 C. B. 205.

(*r*) *Chambers v. Goldwin*, 9 Ves. 271.

(*s*) *Bonithon v. Hockmore*, 1 Vern. 316; *French v. Baron*, 2 Atk. 120; *Godfrey v. Watson*, 3 id. 518; *Nicholson v. Tutin*, 3 K. & J. 159; 3 Jur., N. S. 235.

contract to the mortgagor's receiver, if one had been appointed (*t*).

But the cost of a receiver would be allowed where the appointment was a provident act, although the mortgage were vested in a trustee for the mortgagee (*u*), whose position was such that he might have received the rents himself without much trouble; the equitable, and not the legal owner, being the person whose means of managing the estate are considered.

**1536.** A mortgagee executing his power of sale is so far in the position of a trustee, that he can have no commission for conducting the sale professionally, and the prohibition extends to the partnership of which he may be a member (*x*). Auctioneers, therefore, can have no allowance upon selling for one of their firm, who is a mortgagee with a power of sale. But persons in the position of mortgagees, who sell, or, it may be presumed, receive the profits of, or otherwise manage the mortgaged property, under the direction of the court, are not deprived (*y*) of the remuneration to which they would ordinarily be entitled, because they are mortgagees of the same property. Therefore, where shipbrokers, being also mortgagees, sold the ships which were the subject of the security, although they were allowed no brokerage in respect of a ship sold by them under their power as mortgagees, or trustees for sale, yet as to sales made under the direction of the court, and not under their own title, they were allowed a fair and reasonable commission.

And it seems that an agreement by the mortgagor of ships to employ the mortgagees as brokers in such sales as shall be made under the security, at a rate exceeding the usual rate of brokerage, is valid (*z*)—an exception to the rule above

(*t*) *Stains v. Banks*, 9 Jur., N. S. 1049.

(*u*) *Davis v. Dendy*, 3 Mad. 170.

(*x*) *Mathison v. Clarke*, 3 Drew. 3; 18 Jur. 1020. For the rule as it affects trustees in general, see 1 Y. & C. C. C.

326; 1 Coll. 260; 2 Beav. 128; 8 id. 593; 9 id. 388; 10 id. 523.

(*y*) *Arnold v. Garner*, 2 Ph. 231; 16 L. J., N. S., Ch. 329.

(*z*) *Arnold v. Garner*, 2 Ph. 231.

stated, which is doubtless made in favour of the course and custom of trade.

**1537.** The mortgagees of West India estates, when out of possession, also stand in this matter upon a somewhat different footing from ordinary mortgagees (209): being allowed to stipulate for, and to charge (a) commission upon consignments from and supplies to the estates, and to agree that the produce shall be consigned to them, so long as the debt remains (b). But the commission upon consignments made in the West Indies, and upon the money expended there for the use of the estate, is only allowed as compensation for the trouble of management, and requires personal attention to that duty. The mortgagee, however, will be allowed what he may have actually paid to others, whom he has entrusted with the management in his absence, provided such payments be reasonable: which may be the subject of inquiry (c).

And even when he is in possession, the usual charges may be made on West India mortgages for commission upon the consignments, in cases in which duties and obligations beyond those of an ordinary mortgagee are cast upon the mortgagees, as where (d) they take upon themselves to provide for debts due from the mortgagor to third persons, and by the terms of the agreement they are to be in possession of the estate, and to manage it by their agents; receiving however no commission for the management, in case the debtor should take it upon himself.

But the first mortgagee of a West India estate will not be appointed consignee, without a previous stipulation for such an appointment, because his proper remedy is to take possession of the estate (e), and being then subject to the same rules

(a) *Leith v. Irvine*, 1 My. & K. 277. That a managing agent in England, not in the position of a trustee, may be entitled to commission or profit on materials supplied, if he stipulate for it; but not where it is only provided that he shall be allowed for "expenditure;" see *Ogden v. Battams*, 1 Jur., N. S. 791.

(b) *Bunbury v. Winter*, 1 Jac. & W. 255.

(c) *Chambers v. Goldwin*, 9 Ves. 254; *Forrest v. Elwes*, 2 Mer. 68.

(d) *Bunbury v. Winter*, 1 Jac. & W. 255; *Faulkner v. Daniel*, 3 Hare, 218; *Sayers v. Whitfield*, 1 Knapp, 133.

(e) *Cox v. Champneys*, Jac. 576.

as other mortgagees in possession, he will not be entitled to allowances for management, or to commission on consignments (*g*). It has been doubted (*h*), whether the consignee of a West India estate can contract for consignments beyond as well as during the time in which the estate is indebted to him for advances.

**1538.** If a mortgagee in possession, whether in this or a foreign country, manage the mortgaged estate by his agent, he may charge for the agent's salary, though not for his own trouble; and if at the time, and irrespective of his taking possession, he have already in his employ clerks or agents, by whom the business of the estate is transacted, he is equally entitled to reimbursement in respect of the attention and time bestowed by his servants upon this new business; and the value of this right will be fixed by apportioning the whole expense of the trading establishment among the whole of the concerns managed by it, allotting to each its rateable share of the cost. And upon this principle an inquiry has been directed (*i*), in the case of a West India mortgage, into the proportion which the consignments and supplies of the mortgaged estate bore to the whole consignments and supplies under the mortgagee's management.

**1539.** The rules which prohibit or limit the making of payments or allowances by the mortgagor to the mortgagee in possession do not altogether depend upon the laws concerning usury, and by the repeal of those laws (**1596**) they are probably not affected (**349**). As a mere creditor out of possession, the mortgagee might even before the repeal of the usury laws take reward for managing the estate, provided it were not taken as the price of forbearing the demand of the debt. But upon taking possession, he becomes, not as he is sometimes called, a trustee (for that character does not belong to him in strictness until he is holding over after payment of

(*g*) *Leith v. Irvine*, 1 Myl. & K. 255.

277.

(*i*) *Leith v. Irvine*, 1 Myl. & K.

(*h*) *Bunbury v. Winter*, 1 Jac. & W. 277.

his debt), but *quasi* owner of the estate; and being then in uncontrolled management without any power of interference in the mortgagor, except some act be done which calls for the interference of the court, or any security against overcharges, no allowances are made him either directly or indirectly in respect of his personal trouble (*k*). And this rule the courts appear strongly inclined to uphold under the jurisdiction of equity to prevent oppressive bargains (*l*).

An improper allowance, in an account between the mortgagor and mortgagee, made to the latter in respect of payment for receiving rents, is a ground to surcharge and falsify (*m*).

*Of taking the Account with Rests.*

**1540.** The usual (*n*) mode of taking accounts against the mortgagee in possession, is to set the total amount of rents and profits received by, or found to be chargeable to him, against the whole amount due upon the mortgage debt; viz., in discharge successively of the interest of the mortgage debt, and of money advanced for costs and improvements, and then of the principal of the same monies (*o*): but where a considerable part of the estate or one of several estates mortgaged to the same person is sold, the course is to apply the surplus of the purchase-money after payment of interest and costs, in the discharge of an equivalent amount of the principal, and then to continue the accounts against the mortgagee in possession on the footing of the diminished principal debt (*p*).

In certain cases, also, in accounts of real estate (*q*), where the receipts of the mortgagee (*r*) are more than sufficient to cover the interest, the annual surplus will be considered as applicable

(*k*) *Leith v. Irvine*, 1 Myl. & K. 277; *Robertson v. Norris*, 1 Gif. 428.

(*l*) *Broad v. Selfe*, 9 Jur., N. S. 885; *Barrett v. Hartley*, L. R., 2 Eq. 795; *Eyre v. Hughes*, L. R., 2 Ch. Div. 148.

(*m*) *Langstaffe v. Fenwick*, 10 Ves. 404.

(*n*) *Pow. Mort.* 958, a, ed. 6.

(*o*) *Webb v. Rorke*, 2 Sch. & Lef. 661.

(*p*) *Thompson v. Hudson*, L. R., 10 Eq. 497.

(*q*) *Robinson v. Cumming*, 2 Atk. 410.

(*r*) *Thorneycroft v. Crockett*, 2 H. L. C. 239.

in reduction of the principal money; and this is called taking the accounts *with rests*.

**1541.** It is not of course to direct rests against the mortgagee in possession (*s*); the mere facts that he has recovered and held possession for some time and that the annual rents exceeded the interest are not sufficient ground for such an order (*t*); and although the circumstances that the interest has not been in arrear, and that the rents and profits have exceeded the interest, are reasons for directing them to be made, they will not be directed on account of every trifling excess of interest (*u*). On the other hand rests are not usually directed, where the interest was in arrear at the time of taking possession (*x*), and the liability to this mode of account does not, without special reason, attach to a mortgagee who has taken possession when an arrear of interest was due, after that arrear has been paid off (*y*). As, where for ten years the mortgagee's receipts were less than his payments, but exceeded them during the rest of his possession, though not to an amount sufficient to discharge the mortgage debt; and the court refused to order rests against him (*z*). Because rests are not directed from a particular period of the account, when the arrear of interest only is discharged (*a*). But from the time of payment of the principal they will be directed from a particular period (*b*).

**1542.** Nor is the fact, that an arrear of interest is or is not due at the time of taking possession, altogether decisive upon the question of rests, but the general right of a mort-

(*s*) *Davis v. May*, Coop. 238; 19 Ves. 382; *Donovan v. Fricker*, Jac. 165. Otherwise in Ireland, where rests are made half-yearly without special direction; but not at intermediate periods. (*Graham v. Walker*, 11 Ir. Eq. R. 415.)

(*t*) *Baldwin v. Lewis*, 4 L. J., N. S., Ch. 113.

(*u*) *Shephard v. Elliot*, 4 Mad. 254; *Gould v. Tancred*, 2 Atk. 533; *Schole-*

*field v. Ingram*, C. P. Cooper, 477.

(*x*) *Stephens v. Willings*, 4 L. J., N. S., Ch. 281; *Wilson v. Cluer*, 3 Beav. 136; *Moore v. Painter*, 6 Jur. 903.

(*y*) *Finch v. Brown*, 3 Beav. 70.

(*z*) *Latter v. Dashwood*, 6 Sim. 462.

(*a*) *Davis v. May*, Coop. 238; 19 Ves. 382.

(*b*) *Wilson v. Metcalfe*, 1 Russ. 530; *Wilson v. Cluer*, 3 Beav. 136.



gagee not to be paid piecemeal, as well as the circumstances of the particular case, will be considered (*c*). So that if the mortgagee have been driven by the acts of others to take possession, have been harassed by litigation, and thereby put to costs (even though the costs have afterwards been adjudged to be paid him by his opponent), and his own conduct have been free from harshness or vexation, or, if in the case of leaseholds, the security be endangered by nonpayment of ground rent or insurance, or through want of repairs, rests will not be directed against him, though as to other circumstances he might be within the general rule.

**1543.** Generally if a mortgagee be not liable to rests when he takes possession he will not become so until the principal as well as the interest of the mortgage debt has been discharged (*d*). But if the mortgagee have taken possession, under circumstances which do not subject him to annual rests, and there is afterwards a settled account, by which it appears that no interest is due, or that if any be in fact due, it has been satisfied as interest, by being turned into principal; and the mortgagee continues in receipt of rents more than sufficient to satisfy the interest of such principal, the settlement is considered as a rest made by the parties: and the mortgagee will thenceforth be treated as a mortgagee who takes possession, with no interest in arrear, and will be subject (*e*) to annual rests (*f*). Where the mortgagee takes possession after bills have been

(*c*) *Horlock v. Smith*, 1 Coll. 287; *Gould v. Tancred*, 2 Atk. 534; and see id. 411; *Patch v. Wild*, 30 Beav. 99, observations of Turner, L. J., 3 De G. & J. 122.

(*d*) Per Lord Langdale, 3 Beav. 140; *Scholefield v. Lockwood*, 32 Beav. 439.

(*e*) *Wilson v. Cluer*, 3 Beav. 136; 9 L. J., N. S., Ch. 333.

(*f*) *Direction to make Rests*—“Take an account of what shall be coming due on account of rents and profits, to be applied in the first place in payment of interest and principal, and make annual rests; and in taking

such account make all just allowances.” (*Yates v. Hambly*, 1 Mad. 14.) But the following is more strict:—“Take an account, &c.; and in taking the said account, make annual rests of the clear balance, and compute interest on such respective balances at 5l. per cent.; and in making such annual rests, except the first, include in the balance then stated the interest of each preceding balance (1547), so as to charge the defendant with compound interest thereon.” (*Cotham v. West*, Rolls, 15th November, 1836, R. L.)

indorsed to him for the arrears of interest, which bills become due and are dishonoured after possession taken, the interest is considered to be in arrear at the time of taking possession, and no rests will be made (*g*).

**1544.** The mortgagee in occupation is as much within the principle upon which rests are directed, as he who merely receives the rents and profits, and the court can accordingly direct rests to be made (*h*) in taking accounts of occupation rents. But rests are not directed where the occupation is under an agreement for tenancy with the mortgagor (*i*).

**1545.** Where an incumbrancer denies his character as such, and sets up an adverse title, he will not be suffered to turn round, being defeated, and claim all the benefits attached to the character of a fair creditor; but rests will be directed (*k*) against such an incumbrancer, where in an ordinary case none would have been directed according to the general principles of the court.

**1546.** Annual rests cannot be made in taking the accounts, unless they be directed by the decree (*l*), and where omitted they cannot be directed in chambers under 15 & 16 Vict. c. 86, s. 54, or under Cons. Gen. Ord. xxxv. rule 19 (*m*).

And the court will not in this or other respects direct accounts to be taken in a different manner from those commonly directed in redemption decrees, unless sufficient ground be raised in the pleadings, such as a suggestion that the rents and profits exceeded the interest; or unless some case be made for keeping

(*g*) *Dobson v. Land*, 4 De G. & S. 575.

(*h*) *Wilson v. Metcalfe*, 1 Russ. 530. Make annual rests in account of the rents received by, and on the occupation rent accrued due from, the late A. N. in her lifetime; and also on the rents received by, and occupation rent accrued due from, the said defendants, or any of them, since the death of A. N.; and compute interest after the

rate of 4l. per cent. upon such rents and occupation rents respectively. (Id.)

(*i*) *Page v. Linwood*, 4 Cl. & Fin. 399.

(*k*) *Incorporated Society v. Richards*, 1 Drn. & War. 258, 290.

(*l*) *Gould v. Tancred*, 2 Atk. 533; *Webber v. Hunt*, 1 Mad. 13; *Fowler v. Wightwick*, cited there; *Donovan v. Fricker*, Jac. 165.

(*m*) *Nelson v. Booth*, 3 De G. & J. 119; 27 L. J., N. S., Ch. 782.

the question open for future determination (*n*). But if at a later stage of the cause it appear as the result of inquiries already directed, that the mortgage debt was paid off during the mortgagee's possession by means of the rents and profits, rests will be directed (*o*) from that time, though no foundation were laid for them, or direction given by a previous order. And this may be done, where, pending the proceedings under the decree, and prior to the report or certificate, the mortgagee for the first time becomes overpaid by the receipt of rents, though he will not be charged (*p*) with interest on the surplus received prior to the date of the report, but will be charged with the sums subsequently received, with interest thereon at four per cent. from the times when they were received.

A false statement by the mortgagee, in his answer, that the mortgage remains unsatisfied, will also be a reason for a subsequent direction to make rests (*q*).

And if rests have been directed in a redemption suit, which is afterwards abandoned, and a foreclosure suit commenced by the mortgagee, the accounts will be taken in the new suit on the footing of the former decree, up to the date thereof, and therefore with rests; though there be no evidence in the new suit to warrant a decree with rests (*r*).

It has been said, that the sums which a mortgagee in possession receives in respect of the mortgaged premises, at times between the dates of the annual rests, must be applied when they exceed the interest, to sink the principal (*s*). But this intimation was founded upon the usury laws, since the repeal of which it is presumed that no such rests will be made unless for particular reasons they are specially directed.

**1547.** Where the direction is to ascertain the balances in the hands of an accounting party, at the end of each year, and to

(*n*) *Neesom v. Clarkson*, 4 Hare, 97;  
*Scholefield v. Ingram*, C. P. Cooper,  
477.

(*o*) *Wilson v. Metcalfe*, 1 Russ.  
530.

(*p*) *Lloyd v. Jones*, 12 Sim. 490.

(*q*) *Montgomery v. Calland*, 14 Sim.

79. In *Quarrell v. Beckford*, 1 Mad.  
269, simple interest only was asked for  
and given.

(*r*) *Morris v. Islip*, 20 Beav. 654.

(*s*) *Binnington v. Harwood*, T. & R.  
477.

compute interest thereon, at the end of each year, the terms of the decree will be satisfied (*t*) by calculating interest upon each balance of principal, for the year following that in which such balance is ascertained, and charging the party with the aggregate of the sums of interest, in addition to the ultimate balance of principal. But if the decree also direct annual rests, and that the party be charged with interest on the balances, at the rate and in the manner directed in respect of the former computation of interest, the interest calculated on the original balances, instead of being carried to a separate account, and being added together to form the ultimate balance, must be added (*u*) from time to time to the balance of principal found due, and the future interest must be calculated on such joint balances of principal and interest (*x*).

And if the decree direct (*y*), that when and as often as the rents and profits exceed the interest of the mortgage debt, they are to be applied in reduction of the principal, the sums received by the mortgagee between the dates of the annual rests, calculated from the date of the mortgage deed, are to be applied whenever they exceed the interest, in reduction of the principal; and the rest will thenceforth be calculated from the time of such excess.

*Of carrying on the Accounts.*

**1548.** After the amount due has been ascertained and certified, the proper course for the mortgagee in possession appears to be to retain the possession, but to abstain from receiving the profits; for if the mortgagee vary the amount found due by the receipt before default, of rent or other monies on account of the estate, the accounts must be carried on and a new day fixed for redemption (*z*) (**1696**); and where the mortgagor insisted upon this right to carry on the accounts,

(*t*) *Heighington v. Grant*, 5 Myl. & C. 258.

(*u*) *Id.*; *Raphael v. Boehm*, 11 Ves. 92.

(*x*) See *Yates v. Hambly*, 1 Mad. 14; *Cotham v. West*, Reg. Lib. supra.

(*y*) *Binnington v. Harwood*, T. & R. 477.

(*z*) *Garlick v. Jackson*, 4 Beav. 154; *Alden v. Foster*, 5 id. 592; *Ellis v. Griffiths*, 7 Beav. 83; *Prees v. Coke*, L. R., 6 Ch. 645.

the mortgagee was not allowed to verify by affidavit, and pay over the amount received after the taking of the accounts (*a*); though it has been said to be of course to make him account by affidavit for subsequent receipts (*b*).

The receipt of rent after default, and before the affidavit of default, does not make a further account necessary (*c*).

There is very little authority as to the proper course, when the mortgagee is in possession of property, the receipts from which are at frequent and irregular periods. In the case of tolls, after the first day fixed for payment, the plaintiff has been ordered to appropriate the net subsequent receipts in satisfaction of subsequent interest (*d*); and it seems doubtful whether the court would make any special order, until the variation of the balance found due makes it necessary to carry on the accounts.



## CHAPTER XI. PART 2:—OF ACCOUNTS OF INTEREST.

1549. *Of the Persons who are bound to pay and entitled to receive Interest.*

1575. *Of the Conversion of Interest in arrear into Principal.*

1580. *Of computing subsequent Interest.*

1584. *Of the Right to set off Arrears of Interest.*

1585. *Of the Right to Arrears of Interest under the Statute of Limitations.*

1592. *Of the Rate of Interest.*

1597. *When Interest ceases.*

1549. Interest is not payable upon a mere contract for lending money, even where the contract is under seal, unless there be an agreement, express or implied, for the payment of interest: and except in the case of mercantile securities, or where the promise to pay interest is to be inferred from the usage of trade (*e*).

Upon bond (*f*), and mortgage debts, interest is payable, though it be not expressly reserved, and whether the mortgage

(*a*) *Buchanan v. Greenway*, 12 Beav. 355.

(*b*) *Oxenham v. Ellis*, 18 Beav. 593.

(*c*) *Constable v. Howick*, 5 Jur., N. S. 331.

(*d*) *Gurney v. Duckett*, Set. 405, ed. 3.

(*e*) *Calton v. Bragg*, 15 East, 223; *Higgins v. Sargent*, 2 B. & C. 348; *Page v. Newman*, 9 B. & C. 373.

(*f*) *Farquhar v. Morris*, 7 T. R. 124.

be legal or equitable (*g*); but not where the contract expressly provides for reconveyance upon payment of the principal only (*h*). It has been doubted (*i*) whether a mere deposit of title deeds, without a legal security, will make a debt bear interest which bears none in its nature; but the anonymous case above cited seems to dispose of the question. A mere deposit of deeds, with intent to create a security, having clearly the effect of an equitable mortgage (36), the right to interest is implied without any express agreement (*h*); and the rule is the same where the principal sum is merely a charge upon specified property (*l*). A power to charge land with a sum of money carries power to charge it also with interest (*m*).

A charge of debts by will, upon real estate, does not entitle simple contract creditors to interest, unless the debtor have given to the debts the quality of specialties in his lifetime, as by making a schedule of debts and creating a trust term for payment thereof (*n*). If the debtor execute a deed of trust for the benefit of his creditors, those who execute the deed become mortgagees, and get a right to interest; but they have no such right under a mere covenant on the part of the debtor to pay the debt. If, by the terms of the deed, some of the creditors are to be paid their debts, and others are to be paid their debts with interest, the latter class have a priority as to interest (*o*).

Where an award, made under an arbitration, directed the payment of a sum of money on given days, without interest, out of the proceeds of securities not then realized, and a con-

(*g*) *Anon.*, 4 Taunt. 876; *Ashwell v. Staunton*, 30 Beav. 52. By the Roman Dutch law, when the arrears of interest amount to more than the principal, the remaining interest may not be paid, and the course of interest then ceases. (*Van Leeuwen*, bk. 4, ch. 7, s. 6.)

(*h*) *Thompson v. Drew*, 20 Beav. 49; see *Hodge, Exp.*, 26 L. J., N. S., Bank. 77.

(*i*) *Ashton v. Dalton*, 2 Coll. 565.

(*h*) *Carey v. Doyme*, 5 Ir. Ch. R. 104; *Kerr's policy*, Re, L. R., 8 Eq. 331. Interest at 4 per cent. only given in the latter case.

(*l*) *Lippard v. Ricketts*, L. R., 14 Eq. 291.

(*m*) *Kilmurry v. Geary*, 2 Salk. 538.

(*n*) *Stewart v. Noble*, Vern. & Scriv. 528—537; *Barwell v. Parker*, 2 Ves. 364.

(*o*) *Jenkins v. Perry*, 3 Y. & C. 178.

siderable time elapsed before the securities were realized, it was held, that although the money was awarded to be paid on certain days, so that interest might be recoverable from those days on the contract (*p*), yet the proceeds of the securities could not on that account be made liable for interest, contrary to the agreement, though the debts in respect of which the award was made were debts bearing interest (*q*).

**1550.** Interest arises on mortgages and mortgage debentures from day to day (*r*); but it is said to be a rule of the Court of Chancery in Ireland, that it ought not to run, in the case of a general and national calamity, during such time as, in consequence thereof, nothing is paid out of the land assigned for payment of interest (*s*). The person who takes the produce of the security is entitled to the interest to the time of his death, or other termination of his interest; and the interest of money secured on mortgage has thus been paid over to the administratrix of a tenant for life, though the mortgage money was subject to a trust to be applied in the purchase of land; and it was not taken as rent unapportionable before the act 4 & 5 Will. 4, c. 22, s. 2 (*t*).

**1551.** It has been held that an agreement to pay interest up to a certain time does not exclude a contract to pay it after that time; but that the reservation of interest shows that the debt was intended to bear interest, and makes it reasonable to suppose that it should continue to do so (*u*). But it has since been determined that no implied contract arises for payment of interest beyond the day fixed by the contract, and that

(*p*) *Lowndes v. Collens*, 17 Ves. 27.

(*q*) *Collett v. Newnham*, 1 Drew. 447.

(*r*) *Wilson v. Harman*, 2 Ves. 672; *Roger's Trusts*, Re, 1 Dr. & S. 338; 30 L. J., N. S., Ch. 153.

(*s*) *Basil v. Acheson*, 15 Vin. Abr. 474; 2 Eq. Ca. Abr. 611; 4 Bro. P. C. 503; and accordingly ordered by the House of Lords, that in taking the

account such abatements or allowances were to be made for interest, as were usually made in Ireland, on account of rebellion or other public calamities happening to affect estates in mortgage.

(*t*) *Edwards v. Warwick*, 2 P. W. 171.

(*u*) *Price v. Great Western Railway Co.*, 16 M. & W. 244; 16 L. J., N. S., Ex. 87.

subsequent interest is given by way of damages for breach of the contract (*x*).

**1552.** The mortgagee in possession, who holds over after payment of everything due to him, will be charged with subsequent receipts and interest from the filing of the bill, or from the date of a prior notice, to pay over his receipts as directed by the notice, or even from the time of payment, if he falsely deny by his answer that the mortgage is satisfied; and a mortgagee who has not been in possession is liable to pay interest on a balance found to be due from him if he improperly resist redemption (*y*).

**1553.** If the mortgagor come to the court to restrain the mortgagee from using his remedy at law, the indulgence will only be granted upon payment to the mortgagee of the principal sum and all interest which appears to be due to the time of payment; but in a proper case the payment of interest may be ordered to be made without prejudice to any question in the cause; as if the mortgagor contend that he was prevented from redeeming at the time for which notice was given, by the negligence or default of the mortgagee. And if such a case be established, the surplus interest may be ordered to be repaid (*z*).

If a scrivener take money and give a note to place it out at interest, he is bound to do so and is answerable for the interest, except so far as the employer may have accepted any security which he may have effected (*a*).

**1554.** The court allows the mortgagee interest in certain cases upon money which he has laid out for the benefit of the estate or the support of his security (**1527**), payments so made being treated as further advances; and the rate is generally that which is payable on the original loan. Thus, interest will be

(*x*) *Cook v. Fowler*, L. R., 7 E. & I. App. 27.

(*y*) *Smith v. Pilkington*, 1 De G., F. & J. 120.

(*z*) *Lord Middleton v. Eliot*, 15 Sim. 531.

(*a*) *Barwell v. Parker*, 2 Ves. 364.



allowed upon fines paid by the mortgagee for the renewal of leases upon which the estate is held, though there be no covenant by the mortgagor for renewal (*b*), upon premiums on life policies, which form part of the security (*c*), upon money laid out in supporting the mortgagor's title where it has been impeached (*d*), or in the redemption of land tax (*e*); and generally upon money laid out in lasting improvements or otherwise for the benefit of the estate, where the principal so laid out is allowed (*f*). And interest has been given upon premiums paid for keeping up life policies, to which the security was made subject, under a provision charging the security with payment of all such sums as a surety should be compelled to pay, with interest thereon (*g*); but interest was not given under that provision upon costs paid by the surety; though it will be directed upon costs also, where they have been paid under an order of the court which declared the person paying them to be entitled to an indemnity for so doing (*h*), as well as upon interest which the owner of an incumbered estate has been compelled to pay, where the former owner has covenanted to indemnify him against such incumbrances (*i*).

Interest has also been allowed upon large sums expended by the mortgagee in the working of mines, where he was authorized by the deed to work them and was to be repaid all costs and expenses with interest (1531).

It is not the practice generally to allow interest upon money expended by the mortgagee in repairs, although it has sometimes been done (*h*).

**1555.** A mortgagee will be allowed no interest upon a debt which would have been satisfied but for his wrongful or inequitable act, during such time as the debt has thereby remained

(*b*) 5 Bac. Abr. 736; *Manlove v. Bale*, 2 Vern. 84; *Lacon v. Mertins*, 3 Atk. 4; *Wolley v. Drag*, 2 Anst. 551.

(*c*) *Bellamy v. Brickenden*, 2 Jo. & H. 137.

(*d*) *Godfrey v. Watson*, 3 Atk. 518.

(*e*) *Knowles v. Chapman*, Set. Dec. 226, ed. 2.

(*f*) *Quarrell v. Beckford*, 1 Mad.

281; *Webb v. Rorke*, 2 Sch. & Lef. 676.

(*g*) *Hodgson v. Hodgson*, 2 Keen, 704.

(*h*) *Wainman v. Bowker*, 8 Beav. 363.

(*i*) *Executors of Fergus v. Gore*, 1 Sch. & Lef. 107.

(*h*) Set. 384, ed. 3.

unsatisfied. Thus (*l*), where a vendor who had become liable to an action by the purchaser upon a covenant for quiet enjoyment, delayed the purchaser's action, by setting up an acknowledgment, improperly obtained from the mortgagee of the latter (whose mortgage he paid off), that the payment was in full of all demands in respect of the covenant; interest on the mortgage debt was refused during the delay of the action, because the damages recovered at law would, but for the delay, have swept away the mortgage debt, so that the interest could never have accrued.

**1556.** If a prior mortgagee does not take possession and the interest runs in arrear, a subsequent mortgagee shall not redeem without paying the whole interest, as he might himself have redeemed (*m*) (**1238**). And this, it is said, even though the prior mortgagee let the interest run in arrear with an ill intent, to get the estate; but if there be fraud or collusion it will be otherwise (*n*).

So, the neglect, without fraud, of the incumbrancer to demand interest from the tenant for life, or to require him to pay head rents, will not prejudice the right against the remainderman (*o*).

**1557.** The adult tenant in tail of an incumbered estate is not obliged to keep down the interest on the charge; because, having or being able by his own act to acquire full power over the estate, neither the issue in tail nor the remainderman have any equity to call for an indemnity against the arrears of interest accrued during the possession of their predecessor (*p*). And on the other hand, if the tenant in tail die without barring the entail, after keeping down the interest, or taking an assignment of the mortgage (in which case he is considered to have paid himself the interest out of the rents and profits), the issue

(*l*) *Thornton v. Court*, 3 De G., M. & G. 293, 301.

(*m*) *Aston v. Aston*, 1 Ves. 263.

(*n*) *Bentham v. Haincourt*, Pre. Ch. 30.

(*o*) *Loftus v. Swift*, 2 Sch. & Lef.

642; *Roe v. Pogson*, 2 Mad. 457; *Wrixon v. Vize*, 2 Dru. & War. 203;

*Hill v. Browne*, Dru. 426; *Making v. Making*, 1 De G., F. & J. 355.

(*p*) *Chaplin v. Chaplin*, 3 Atk. 234; *Burges v. Mawbey*, T. & R. 167.

in tail have the benefit, and the personal representatives of the tenant in tail have no equity to charge the reversion with interest accrued during his life (*g*). And so it is if the husband of tenant in tail seised in right of his wife, take in the mortgage, for he takes subject to all the rights and remedies of the mortgagee and the reversioner, and, after receiving the rents during the wife's life, cannot come against the estate for the interest (*r*) (1306).

But in such a case, an account will be directed of the profits accrued since the death of the wife, and subsequent interest will be allowed.

**1558.** An infant tenant in tail, however, being unable to make the estate his own, is not upon the same footing as an adult, but is in the position of a tenant for life (*s*) (1562), who is bound (*t*) (as is also the tenant for years (*u*)) to keep down the interest of the charge during the continuance of his estate, to the extent of the rents and profits; and who is not exempted from this liability by the possession of an absolute power of appointment, by virtue whereof he is able, like the tenant in tail, to make the estate his own (*x*); and who cannot discharge himself from it by procuring the mortgage to be assigned to a

(*g*) *Amesbury v. Brown*, 1 Ves. 477.

(*r*) *Id.*

(*s*) *Sarjeson v. Cruise*, cited 1 Ves. 477, 480; *S. C. Sargeson v. Sealy*, 2 Atk. 412, and T. & R. 176; per Lord Redesdale, 1 Bli. 499; *Burges v. Mawbey*, T. & R. 177. But note that Sir T. Plumer, M. R., puts a wrong construction upon the words of Sir W. Grant, M. R., in *Bertie v. Lord Abingdon*, 3 Mer. 566. The latter is supposed to have said that "there could be no question as to the obligation of an infant tenant in tail to keep down the interest." His words really were, "There can be no question *in this case* with respect to the obligation, &c." *i. e.* the question does not arise here. For the question was between real and

personal representatives, between whom there is no equity, but only between the representatives and those in remainder.

(*t*) *Revel v. Watkinson*, 1 Ves. 93; *Amesbury v. Brown*, *id.* 477; *Faulkner v. Daniel*, 3 Hare, 199; *Bulwer v. Astley*, 1 Ph. 422; *Playfair v. Cooper*, 17 Beav. 187; and see T. & R. 174; 1 Jur., N. S. 580. And in an administration suit he must keep down the interest upon all debts charged upon the estate from the testator's death. (*Marshall v. Crowther*, L. R., 2 Ch. Div. 199.)

(*u*) 1 Ves. 480; per Lord Hardwicke.

(*x*) *Whitbread v. Smith*, 3 De G., M. & G. 741.

trustee for himself(*y*). The assignee and judgment creditor of the tenant for life are subject to the same equity(*z*).

It is incumbent on the reversioner, to see that this duty, which only subsists in his favour, and gives no right to the incumbrancer(*a*), is performed by the tenant for life(*b*); and if it be neglected, the reversioner(*c*), or it seems the next tenant for life(*d*), may file his bill to make the rents amenable, and may compel the tenant for life to answer what has accrued; and has an equity to have the estate recouped out of the future income accruing to the tenant for life(*e*). But if the reversioner stand by, and allow the rents to be received, and not applied in payment of interest, the reversion will be charged, and the reversioner cannot afterwards establish a debt against the assets, on the ground that the rents were sufficient(*f*) (1446).

The reversion may also be charged, if the rents be insufficient, and the arrears of interest have thus been thrown upon the reversion, where, having accrued during the time of one tenant for life, they were discharged by the trustees of a subsequent life estate(*g*).

And where the tenant for life of an incumbered estate charged the estate under a power, with a principal sum and interest, and then mortgaged both the charge and the interest, and kept down so much of the interest as the estate would not pay, out of his own monies, without informing the remainderman of the insufficiency, or of the intention to charge

(*y*) *Long v. Harris*, 1 Jur., N. S. 913.

(*z*) *Scholefield v. Lookwood*, 9 Jur., N. S. 1258.

(*a*) *Morley v. Saunders*, L. R., 8 Eq. 596.

(*b*) 2 Jo. & Lat. 160; Kay, 339.

(*c*) 5 Ves. 106; and see *Hayes v. Hayes*, 1 Ch. Ca. 223. See per Lord Campbell, C., 7 H. L. C. 575; *Making v. Making*, 1 De G., F. & J. 355. But per Lord Westbury, C., in *Scholefield v. Lookwood*, supra. "A tenant for life has all his lifetime to pay off the

arrears of interest, and he cannot be charged with neglect of duty, neither does any right arise to the remainderman until death or insolvency of the tenant for life." There seems to be no other authority for this view of the law.

(*d*) *Revel v. Watkinson*, 1 Ves. 93.

(*e*) *Waring v. Coventry*, 2 M. & K. 406.

(*f*) *Lord Kensington v. Bouverie*, 19 Beav. 54; per Lord Romilly.

(*g*) *Sharshaw v. Gibbs*, Kay, 333.

it on the estate, it was held that there was no charge and that the payments showed an intention to exonerate(*h*).

**1559.** If a mortgagee, who has suffered the interest to run in arrear, purchase the estate of the tenant for life, the surplus rents received after the purchase, beyond the current interest of the mortgage, must be applied in discharge of the arrears; and the mortgagee cannot charge the arrears upon the inheritance(*i*): for the vendor under whom he claims was bound to keep down the interest.

**1560.** If an estate have been partly in the possession of a tenant for life, and partly of a person who takes under the limitations of a prior settlement (as a jointress), and therefore is not bound to pay the interest on the incumbrances, the tenant for life must discharge the arrears, which accrued in the time of the paramount estate, out of the additional rents received at its expiration(*k*).

The case of *Tracy v. Lady Hereford* has been stated(*l*) by an eminent judge to establish the general proposition, that a tenant for life in remainder must bear the arrears of interest which accrued during the estate of a prior tenant for life: but this construction has been repudiated as inequitable and unnecessary for the determination of the case in which it was laid down(*m*). The rule goes no further than to make each tenant for life bear the arrears which have accrued during his own time, although during part of the time another may have been in possession of part of the estate under a paramount title(*n*); and to liquidate such arrears he must furnish all the rents if

(*h*) *Lord Kensington v. Bouverie*, 7 H. L. C. 557, and 6 Jur., N. S. 105; diss. Lords Cranworth and Wensleydale, who agreed with the judgments of the L.J.J., holding that the silent payments of the tenant for life did not show an intention to exonerate; see 7 De G., M. & G. 134, and 19 Beav. 39.

(*i*) *Lord Penrhyn v. Hughes*, 5 Ves. 99. So as to a purchaser who actually pays off the arrears. (*Whitbread v.*

*Smith*, 3 De G., M. & G. 741; and see *Ruscombe v. Hare*, 2 Bl., N. S. 192.)

(*k*) *Revel v. Watkinson*, 1 Ves. 93; *Tracy v. Lady Hereford*, 2 Bro. C. C. 128.

(*l*) 5 Ves. 106; per Sir R. Arden, M. R.

(*m*) See 2 Jo. & Lat. 160, per Lord St. Leonards; *Kay*, 339, per Wood, V.-C.

(*n*) *Id.* and *Tracy v. Lady Hereford*, *supra*.

necessary during the whole of his life; but subject, it seems, to this equity(*o*), viz., that if the settlor of the estate be to the tenant for life *in loco parentis*, and the tenant for life not otherwise provided for, a reasonable maintenance shall be allowed him out of the rents and profits.

1561. And where the incumbrances on the estate consist of annuities, the measure of the tenant for life's liability is the value of the annuity, which the decree will direct to be ascertained: and the interest of the estimated amount will be kept down by the tenant for life(*p*). And so the tenant for life, during whose time an annuity prior to his estate has run in arrear, will not be ordered to pay the arrears, but only so much as, during the continuance of his life estate, will keep down the interest of the charge, which those arrears constitute upon the *corpus* of the estate(*q*).

If arrears of rent, which, in the view of a court of equity, are specifically applicable to the payment of interest, be received by the tenant for life, he cannot retain them when the interest is in arrear, though they all accrued in his own time; especially if he were party to a transaction in which those rents were assumed to have been applied in payment of the interest(*r*).

1562. With respect to the infant tenant in tail, there is an apparent disagreement from the general authorities (1558) in an early case(*s*), in which the court refused to order the executors of an infant tenant in tail to pay the arrears of interest out of the infant's personal estate; and the observations of the court, as reported in Peere Williams, tend to show that the decision was upon the general ground, that the tenant in tail is not bound to keep down the interest. It has however

(*o*) *Revel v. Watkinson*, 1 Ves. 193; Butler's case cited there; T. & R. 194. Note, however, that in *Revel v. Watkinson* the bill was by a subsequent tenant for life, which tends to show that he was then considered liable for the arrears.

(*p*) *Bulwer v. Astley*, 1 Ph. 423.

(*q*) *Playfair v. Cooper*, 17 Beav. 187.

(*r*) *Caulfield v. Maguire*, 2 Jo. & Lat. 141.

(*s*) *Chaplin v. Chaplin*, 3 P. Wms. 229.

been suggested (*t*), that the real ground was not that the infant was not liable to keep down the interest, but that it ought not to be paid out of his personal estate; for, *per* Lord Hardwicke (*u*), the rents and profits were the fund out of which the guardian should have paid the interest. And so it was held in the case of *Burges v. Mawbey* (*x*).

The like rule no doubt applies to the infant tenant for life.

**1563.** Where the estates of the husband and wife were mortgaged to secure the husband's debt, and payment was enforced out of the produce of the wife's estate; it was held, that the representatives of the wife should have no interest on the sums, which the husband's estate had thus become liable to recoup to them; and consequently that a judgment creditor of the wife, claiming against the husband's estate upon the foundation of this equity, could have no interest upon the debt which he recovered (*y*). The husband and wife are not bound to keep down the interest of a mortgage on the wife's estate for the benefit of her heir; though for what he may have actually paid in respect of such interest, he will have no allowance. And as tenant by the curtesy (**1558**), he must keep down after his wife's death, the interest on the original debt, and on the arrears which have accrued during her life (*z*).

**1564.** The order of the court, directing a receiver to keep down the interest of incumbrances, does not amount to an appropriation of the rents and profits to that purpose, so as to make the rights of the parties where the interest has not been paid or applied for, the same as if interest had been actually paid (*a*). The order is partly made in justice to the incumbrancers, partly for the benefit of the estate, lest the incumbrancers should proceed in respect of their unpaid interest; but if they do not apply for it, they are presumed to be content with their security for principal and interest, and the estate

(*t*) *Per* Sir T. Plumer, T. & R. 177.

(*u*) *In* *Serjeson v. Sealey*, cited *id.*

(*x*) T. & R. 167, 178.

(*y*) *Lancaster v. Evors*, 10 Beav.

(*z*) *Ruscombe v. Hare*, 2 Bli., N. S.

192.

(*a*) *Bertie v. Lord Abingdon*, 3 Mer.

560.

remains burthened with the arrears, for which there is no equity against the surplus rents paid over by the receiver.

**1565.** A mortgagee who comes to the Court of Bankruptcy for the realization of his security, is entitled to interest upon his debt to the date of the order of adjudication, and when there is a surplus, to interest from that time (*b*); and the same rule applied to a liquidation under an inspectorship deed executed under the Bankruptcy Act, 1861 (*c*); but under peculiar circumstances, as where the mortgagee at the request of the assignees has postponed the sale for the purpose of getting a better market, or has made some other special agreement with them, interest after the bankruptcy will be allowed (*d*).

*Of Payment of Interest on Arrears of Annuities, and on Bond and Judgment Debts.*

**1566.** As a general rule, interest is not allowed upon arrears of an annuity, though it be charged upon land, but under special circumstances only. It was held by Lord Hardwicke, that if the annuity were given for maintenance, or there were a penalty for securing the payment of it, interest should be given on the arrears (*e*). But the rule as to maintenance has not been followed (*f*); and it has been long held, that the security of a bond and penalty raises no equity for interest on the arrears, because no interest was recoverable at law on a judgment debt, though damages were given in the nature of interest (*g*). And the disinclination to give interest has gone so far, that the court has even refused it when the annuity had been enjoyed for many years, and the assignee had been deprived of possession by the act of the court; and

(*b*) *Badger, Exp.*, 4 Ves. 165; *Kensington, Exp.*, 2 M. & A. 300; *Lubbock, Exp.*, 9 Jur., N. S. 854; *Bank. Rules*, 1870; Nos. 77, 137.

(*c*) *Savin, Re*, L. R., 7 Ch. 760.

(*d*) *Kensington, Exp.*, 2 M. & A. 300. See the principle of this rule discussed in *Griffith, Bankruptcy*, 641.

(*e*) *Newman v. Auling*, 3 Atk. 579;

see also *Ferrers v. Ferrers*, Ca. t. Talb. 2.

(*f*) *Tew v. Earl of Winterton*, 1 Ves. jun. 450; *Crenze v. Hunter*, 2 id. 157; and see *Mellish v. Mellish*, 14 Ves. 516.

(*g*) *Booth v. Leycester*, 3 My. & C. 459; *Gaunt v. Taylor*, 3 My. & K. 302.



this, although the fund out of which it was payable was productive, and the interest of it actually went into the pocket of the owner of that fund (*h*). But this seems to have been an extreme case; and though mere legal delay be no ground for giving interest, either on an annuity or a judgment (*i*), yet it seems clear at the present day, that if the annuitant had the means of recovering his annuity at law, but was restrained from doing so at the instance of the person liable to pay the annuity; or if the latter come for the help of the court against the hardship to which he would be exposed at law, the court will give interest on the arrears, on the principle of restoring the annuitant to the position he would have been in if the court had not interfered (*k*). And if the person liable to pay the annuity have grossly misconducted himself, in evading payment of the annuity (*l*), or in disputing its existence on unjust grounds, as by setting up the destruction of a bond after admitting that it was caused by an accident (*m*), or have otherwise, by his conduct or absence, delayed the proceedings of the creditor, interest will be given: especially if the person liable to the payment were a party to the creation of the obligation (*n*).

Interest has been given on the aggregate amount of arrears due at the death of the surviving grantor of an annuity, the fund having been accumulating for many years in court, and there having been no person for a long time after the death of the surviving grantor who could have been sued on the judgment (*o*).

**1567.** To avoid circuity of action the court will also give

(*h*) Per Sir J. Leach, cited 3 D. & W. 138.

(*i*) *Martyn v. Blake*, 3 D. & W. 125; *Berrington v. Evans*, Younge, 276; *Earl Mansfield v. Ogle*, 4 De G. & J. 38.

(*k*) *Booth v. Leicester*, 1 Keen, 247; *Taylor v. Taylor*, 8 Hare, 120.

(*l*) *Martyn v. Blake*, 3 D. & W. 125.

(*m*) *Crosse v. Bedingfield*, 12 Sim. 35; and see 10 Hare, 136.

(*n*) *Booth v. Leicester*, 3 Myl. & C. 459.

(*o*) *Hyde v. Price*, 8 Sim. 578. But this decision is not a strong one. It was pronounced before judgment was given on the appeal in *Booth v. Leicester*, 3 M. & C. 459; see *Jenkins v. Briant*, 16 Sim. 272; and see 10 Hare, 135.

interest where there would be a clear case for damages at law, under a covenant for payment of the annuity, and it is clear that the measure of damages would be the amount of the arrears with interest thereon (*p*); as if there be a covenant to indemnify the annuitant against prior incumbrances, by the claims of the owners of which, the perception of the annuity was prevented, especially if this have occurred in consequence of the acts of the covenantor. But such a case will not arise on a mere covenant to pay the annuity, with a clause enabling the annuitant to enter and hold until payment of the annuity, and of such costs, losses, damages and expenses, as shall be occasioned by non-payment thereof; for such expressions only amount to an indemnity against the costs incident to entry and possession, and loss from enforcing the security (*q*).

**1568.** Although, as a general rule, the court refuses interest on arrears, yet, if the annuitant have entered into possession, he will not be obliged to quit possession unless the grantor will allow him interest; but he cannot have this relief on the ground that there was a power in the grantee to enter, if he did not do so. The grantee must first avail himself of his remedy, and then seek the consequent relief (*r*). Nor will it be assumed (*s*), in favour of the claim for interest, that the annuitant would have used his legal remedies, but for the presence of a receiver appointed by the court; nor admitted, that by reason of the receiver's appointment, the annuitant is to be considered as having been restrained from using his remedies. And the annuitant will not even have the benefit of an accidental union in himself, of the right to the annuity, and the title to the term by which it is secured, where there is a contest respecting the annuity; on the ground that the annuitant may not, as a trustee of the annuity, use for his own benefit a power thus accidentally acquired.

(*p*) *Martyn v. Blake*, 3 D. & W. 125; see also *Gay v. Cox*, 1 Ridg. P. C. 153.

(*q*) *Booth v. Leycester*, 3 M. & C. 459.

(*r*) *Robinson v. Cumming*, 2 Atk. 409; *Booth v. Leycester*, 3 My. & C. 459.

(*s*) *Taylor v. Taylor*, 8 Hare, 120.

1569. Although interest will be given where the arrear has been caused by the act of the party liable for the payment, in taking away the legal right of the annuitant, it is different where there is a substantial dispute as to the annuity, in consequence of which the money has been brought into court for the benefit of all parties (*t*). Where the fund in court has been invested, application should be made to the court to set aside and keep distinct a part of the fund or income required for satisfaction of the annuity; and if this be omitted and the accumulations be carried to a general account, the profit produced by a part of the fund will not be separated for the benefit of the annuitants. This application, it seems, should be made immediately after the title to the annuity has been established (*u*).

1570. The order that a creditor, whose debt does not carry interest and who shall establish it before the judge in chambers, under a decree or order in a suit, shall be entitled to interest at the rate of 4*l.* per cent. per annum from the date of the decree, out of any assets which may remain, after satisfying the costs of the suit, the debts established, and the interest of such debts as by law carry interest (*x*), makes no alteration, it seems, in the general rule concerning interest on arrears; it does not mean that all debts, whenever due, are to bear interest from the date of the decree, but that debts proved after the decree shall bear interest from the time when they are proved; and it has been held in an administration suit, that, after payment of the debts due from the testator, the assets might be made liable to interest upon arrears of an annuity, at the respective times of their becoming due after the date of the decree (*y*).

Nor is the practice of the court in this matter affected at all by 3 & 4 Will. 4, c. 42, s. 28 (1833), which gives to juries, at the trial of an issue or inquisition of damages, power to allow interest to creditors upon debts or sums certain; nor

(*t*) *Taylor v. Taylor*, *supra*.

(*x*) Cons. Ord. XLII. r. 10.

(*u*) *Booth v. Leicester*, 3 My. & C. 459.

(*y*) *Lainson v. Lainson*, 17 Jur. 1044; 18 Beav. 7.

by 1 & 2 Vict. c. 110, ss. 17, 18, which gives interest on judgment debts (*z*).

**1571.** Bond debts generally carry no interest, either at law or in equity, beyond the amount of the penalty, which is taken to represent by the agreement of the parties the ultimate amount of the debt. But the conduct of the obligor, the interference of the court, and other special circumstances, make in this case also exceptions to the general rule (*a*). And if there be a bond and a mortgage to secure the same sum, with all interest that may grow due thereon, interest will be carried under the mortgage beyond the penalty of the bond; for the amount of the penalty is not to prejudice the mortgage (*b*). And it matters not whether the mortgage precede or follow the bond. Interest will also be given in such a case where the mortgagor is a surety, as the creditor may make the mortgage as available as if it were given by the principal debtor. But a trust for payment out of the proceeds of real estate, of bond debts, together with the interest due and to grow due for the same, to the day of payment, will not (*c*) carry interest beyond the penalties of the bonds; for, as interest does not grow due beyond the penalties, by virtue of the rule under consideration, the trust will be satisfied by payment of interest to the amount of the penalties.

**1572.** It has been said (*d*), that if the bond be tacked to another security, as to a mortgage for securing other sums, the mortgagor may not redeem unless he will pay the interest which is above the penalty. This is doubted by Mr. Powell (*e*), because tacking is only to avoid circuity of action (**1014**), but

(*z*) *Re Powell's Trust*, 10 Hare, 134; *Earl Mansfield v. Ogle*, 4 De G. & J. 38.

(*a*) *Tew v. Earl of Winterton*, 3 Bro. C. C. 489; *Mackworth v. Thomas*, 5 Ves. 329; *Clarke v. Seton*, 6 Ves. 411; *Atkinson v. Atkinson*, 1 B. & Be. 239.

(*b*) *Clarke v. Lord Abingdon*, 17 Ves. 106.

(*c*) *Hughes v. Wynne*, 1 My. & K. 20; *Clowes v. Waters*, 16 Jur. 632.

(*d*) *Peers v. Baldwin*, 2 Eq. Ca. Abr. 611.

(*e*) *Pow. Mert.* 355, ed. 6.

it is supported by Mr. Coventry (*f*) on the ground, that the excess of interest may be tacked in the nature of further advances. The doubt of Mr. Powell seems more correct in principle than the reason against it; for a bond is allowed to be tacked to prevent a circuitry of remedy in respect of a recoverable debt, and not to make a new remedy where there was none before: and we have seen that, as a general rule, there is no remedy for interest beyond the penalty. Neither can interest in arrear be turned in such a manner into principal, as the treating it as a further advance would imply (1578). The proposition may, however, be supported upon the principle, that a person, who comes for the aid of equity to compel redemption, must do equity by payment of all interest; and the rule has been so laid down where a mortgagee has tacked a judgment to his mortgage (*g*).

Interest has been given beyond the penalty to a judgment creditor, who was a trustee in possession under the will of the debtor, on the ground that he might have retained the rents (though he did not do so) to pay the interest due to himself, and that but for the filing of the bill he would have retained possession as trustee (*h*).

**1573.** By 1 & 2 Vict. c. 110, s. 17, every judgment debt in England (which includes a debt for which a judgment has been given as security) (*i*), and by 3 & 4 Vict. c. 105, s. 26, every debt due on a judgment, not confessed or recovered for any penal sum, for securing principal and interest in Ireland, bears interest at the rate of 4*l.* per cent. per annum, until satisfaction from the entering up of the judgment; *i. e.*, from the entry of the *incipitur* in the Master's book (*k*). It has been laid down of the Irish (*l*), and it follows of the English act, that no change is made in the character of the

(*f*) Pow. Mort. 355, note (*g*).

(*g*) See Godfrey v. Watson, 3 Atk. 517.

(*h*) Atkinson v. Atkinson, 1 Ba. & Be. 239.

(*i*) Knight v. Bowyer, 4 De G. & J.

619.

(*k*) Fisher v. Dudding, 3 Scott, N. R. 516; 3 M. & G. 238; Newton v. G. J. R. Co., 16 M. & W. 139; 16 L. J., N. S., Ex. 276.

(*l*) Henry v. Smith, 2 D. & War. 381.

judgments, but that the Statute of Limitations continues to bar the interest given on the judgment debt.

The 18th sect. of 1 & 2 Vict. c. 110, which gives to decrees and orders of court the force of judgments, does not, in combination with sect. 17, make a person ordered by the court to pay a sum of money, the amount of which is to be ascertained by inquiry, liable to pay interest on that sum between the date of the decree, and the time at which the amount payable is ascertained (*m*).

**1574.** Whenever a decree is made by the Court of Chancery (172), in which the payment of any costs previously taxed either in the suit or proceeding in which such decree or order is made, or in any other suit or proceeding, is ordered, and whether the certificate of such previous taxation have been made before the passing of the act, or shall be made thereafter, the court or judge making such decree or order may order the amount of such costs as taxed, including the certified costs of taxation, to be paid with interest, at the rate of 4*l.* per cent. per annum from the date of the certificate; the amount of such interest to be verified by affidavit, and to be payable and recoverable out of the same fund, and in the same manner, as the amount of such costs (*n*).

*Of the Conversion of Interest in Arrear into Principal.*

**1575.** It was said (*o*) to be always a rule, that the assignee of a mortgage should have interest for the interest due at the assignment: but now (*p*), if there be an arrear of interest on a mortgage, and an assignment be made by the mortgagee with the concurrence of the mortgagor; the interest paid by the assignee shall be taken as principal, and carry interest; but where it is assigned without the concurrence of the mortgagor (unless it seems (*q*) he first refuse,

(*m*) *A.-G. v. Lord Carrington*, 6 Beav. 460.

(*n*) *The Attorneys and Solicitors Act*, 23 & 24 Vict. c. 127, s. 27.

(*o*) *Anon.*, 1 Ch. Ca. 258.

(*p*) *Ashenhurst v. James*, 3 Atk.

271; *Earl of Macclesfield v. Fitton*, 1 Vern. 168; *Matthews v. Walwyn*, 4 Ves. 118; *Chambers v. Goldwin*, 9 Ves. 254; *Mangles v. Dixon*, 3 H. L. C. 737.

(*q*) *Anon.*, Bunb. 41.

either to pay off the debt, or to join in the assignment), the assignee must take only upon the same terms with the assignor: that is, he will be entitled as against the mortgagor to no more than is actually due on the security, without reference to what he may have paid, and the interest which he pays will not be taken as principal (1496).

1576. The mere privity or assent of the mortgagor to the account is not sufficient (*r*) to change the interest into principal, even if he sign the account; for no intent is thereby shown to alter the nature of that part of the debt which consists of interest. On the other hand, conversion may take place on the mere written consent of the mortgagor, or person entitled to redeem, without his being actually a party to the assignment, or even on inference of his consent arising from his acts or from his acquiescence; thus where interest had been paid for many years upon an ascertained balance of principal and interest, reported due at the date of a decree for sale, the court inferred an agreement that interest should be paid as the price of forbearance to enforce the sale (*s*). And again, where a *puisné* incumbrancer, who had purchased the equity of redemption under a decree of the court, took in two judgments prior to a mortgage security, at the desire of the mortgagee, who was unable to take them in himself, the court considered (*t*) his consent to be equivalent to his joining in the deed, and allowed the judgment creditor interest on all that he had paid.

1577. Inquiries will be directed as to what is due on the mortgage, and what has been paid by the assignee (*u*). If it be denied that anything was due at the time of the assignment, the inquiry will be, what was due at the time of the

(*r*) *Brown v. Barkham*, 1 P. Wms. 652.

(*s*) *McCarthy v. Llandaff*, 1 Ba. & Be. 375.

(*t*) *Ashenhurst v. James*, 3 Atk. 271. There seems formerly to have been a practice of adding the interest

to the principal, upon assignment, after forfeiture by non-payment of interest, though the time for payment of the principal had not arrived. See *Gladwyn v. Hitchman*, 2 Vern. 135.

(*u*) *Smith v. Pemberton*, 1 Ch. Ca. 67.

mortgage, what at the time of the assignment, and what remains due; and if it appear as the result of the inquiry that nothing was due at the time of the assignment, the assignment will be declared void as against the estate of the mortgagor. But if otherwise, and the assignment were made without the mortgagor's privity, he or those claiming under him will be at liberty to redeem on payment of what has been found due on the original security (*x*).

**1578.** Interest upon arrears, or upon fines for nonpayment of principal and interest; is not allowed by the court where there is no contract for it (*y*). And before the abolition of the usury laws there could be no payment of such interest by virtue of an original stipulation in the mortgage deed, but the interest must first be due, before any agreement to turn it into principal would hold good (*z*). It was decided at an early period by Lord Keeper North (*a*), that such interest as was reserved in the body of the deed should be reckoned principal; because, being ascertained by the deed, an action of debt would lie for it, and it was reasonable that damages should be given for its nonpayment. But this doctrine assumed the validity of the bargain, which was afterwards denied, on the ground of usury; and upon that ground alone the rule just stated appears to stand. For, although Lord Eldon said, that such a bargain was neither illegal nor unfair, he added that the court would not allow it, because it tended to usury, though it was not usury (*b*); and another learned judge (*c*), who questioned the accuracy of this language, considered that the doctrine could not be supported, except on the ground that, some advantage being supposed to

(*x*) *Matthews v. Walwyn*, 4 Ves. 129; *Lunn v. St. John*, cited there.

(*y*) *Proctor v. Cooper*, Pre. Ch. 116; *Thornhill v. Evans*, 2 Atk. 330; *Parker v. Butcher*, L. R., 3 Eq. 762.

(*z*) *Lord Ossulston v. Lord Yarmouth*, Salk. 449; *Broadway v. Morecraft*, Mos. 247; *Sir Thomas Meer's case*, cited For. 40; *Champion, Exp.*, 3 Bro. C. C. 440; *Bevan, Exp.*, 9 Ves.

223; *Morgan v. Mather*, 2 Ves. jun. 21.

(*a*) *Howard v. Harris*, 1 Vern. 194.

(*b*) *Chambers v. Goldwin*, 9 Ves. 271.

(*c*) *Alderson, B.*, in *Blackburn v. Warwick*, 2 Y. & C. 92; see also *Sackett v. Bassett*, 4 Mad. 58, where an issue was directed.



arise to the mortgagee, *ultra* the 5*l.* per cent. interest, and that advantage being secured by an original stipulation, the contract savoured of usury. The getting a collateral advantage has also been mentioned as a reason for the rule (*d*), but this seems to be merely a form of usury (*e*); and if it be, as it clearly is (*f*), lawful to turn interest into principal by agreement after the interest has become due, and provided there be no oppression, there seems no reason, save that of usury, why the like bargain may not be made on the original contract, when the parties are dealing at arm's length, and the mortgagor may be able to choose his own lender. It is therefore submitted, that, with the abolition of the laws against usury, all reason for the prohibition of original contracts to turn interest into principal, except where fraud and oppression are in question, has ceased (*g*); and it is believed that such a contract is now generally considered to be valid (349).

It has been said, that interest upon interest in arrear, when the mortgage is paid off, is never allowed in equity (*h*); which probably depends on the rule that interest on arrears will not be given on an agreement made before the arrears were due; but such an agreement for the reason given above would probably now be held good.

**1579.** A mere notice by the mortgagee to the mortgagor is not sufficient to turn arrears of interest into principal. The debtor must distinctly assent to the demand. The agreement must also be made fairly, and is generally and most properly upon the advance of fresh money (*i*). It is clearly not looked upon with favour by the court, and will be avoided by circum-

(*d*) 9 Ves. 272; per Lord Eldon.

(*e*) See *Barnard v. Young*, 17 Ves. 47; *Leith v. Irvine*, 1 My. & K. 284.

(*f*) *Blackburn v. Warwick*, 2 Y. & C. 92; 6 L. J., N. S., Ex. Eq. 16; *Thornhill v. Evans*, 2 Atk. 331.

(*g*) In a case in which, after interest had become due, the mortgagee took a second security for a sum composed of the principal and interest already due, with interest on that interest, the master came to the singular conclusion

that the second transaction was a satisfaction of the first mortgage, but was itself void for usury; thus holding the same deed to be at once good against the creditor for one purpose, and bad for another. The question of usury afterwards went to a jury. (*Sackett v. Bassett*, 4 Mad. 58.)

(*h*) *Thornhill v. Evans*, 2 Atk. 330.

(*i*) *Tompson v. Leith*, 4 Jur., N. S. 1091; *Thornhill v. Evans*, *supra*.

stances which show extortion ; as if the interest on the arrears be fixed at a higher rate than that on the original security.

The infant heir of the mortgagor has been held (*j*) bound by an agreement of this kind, made to prevent the mortgagee from entering; it being clearly for her benefit, and made with the privity of her nearest relations. According to the present doctrine interest in such a case would not be allowed ; and even where the transferee of a mortgage, by payment of arrears of interest and costs, had preserved the estate from a forced sale, it appears to have been assumed that he should only have his principal without interest (*k*) ; though the denial of interest seems to be inconsistent with the practice adopted in salvage cases (1527, 1554).

Such an agreement, made by the assignee of the equity of redemption, in trust for the payment of debts, and to pay the surplus to the mortgagor, has been held (*l*) to bind the mortgagor's heir, though no party thereto.

But when made in favour of the first mortgagee, it will not hold against later incumbrancers of whom he had notice ; for the same reason which prevents a mortgagee from tacking further advances against such subsequent incumbrancers (*m*).

### *Of Computing subsequent Interest.*

1580. It was formerly the practice, upon enlarging the time for payment of the mortgage debt (1688) to direct subsequent interest to be computed on the aggregate amount of principal, interest and costs found due by the former report, and from the confirmation thereof (*n*) ; the reason of which was, that as the further time was given to the mortgagor, by the favour of the court, he was put upon terms, by which the other party would be indemnified for the delay ; or, it has been said (*o*), that he might suffer for disobeying the order of the court for payment

(*j*) *Earl Chesterfield v. Lady Cromwell*, 1 Eq. Ca. Abr. 286.

(*k*) *Cottrell v. Finney*, L. R., 9 Ch. 541.

(*l*) *Conway v. Shrimpton*, 2 Eq. Ca. Abr. 738 ; 5 Bro. P. C. 187.

(*m*) *Digby v. Craggs*, Ambl. 612 ; 2 Eden, 201.

(*n*) *Bickham v. Cross*, 2 Ves. 471 ; *Creuzé v. Hunter*, 2 Ves. jun. 157 ; *Turner v. Turner*, 1 Jac. & W. 39.

(*o*) *Brown v. Barkham*, 1 P. Wms. 652.

on the day fixed. But the practice was not followed in suits in which the delay was not granted by the favour of the court, and it seems not to have prevailed in suits for sale and payment of incumbrances (*p*); the distinction between such suits in which the delay does not arise from the default of the mortgagor, and in which the practice might be highly injurious to the interests of other creditors, and suits for foreclosure, having been long recognized; but in a suit for sale, an order has been made to compute interest on the principal only, without prejudice in case there should be a surplus (*q*).

**1581.** At the present day, it is the practice in suits for administration, where the mortgaged estate has been sold, to compute subsequent interest on the principal only (*r*). In foreclosure suits, when the time for redemption is enlarged, on payment within a short time of the interest and costs (*s*), subsequent interest can of course be given upon the principal only (*t*). But if the court should enlarge the time without imposing this condition, or requiring payment of interest on the whole principal, interest and costs, it will be payable on the principal and costs only (*u*).

**1582.** Where interest runs on the whole sum found due by a certificate, it so runs only from the confirmation of the certificate, and up to that time on the principal only (*x*).

**1583.** Where the question of interest is not reserved by the decree, it is properly a matter of rehearing, or to be determined on further consideration where it is reserved, and should not be

(*p*) *Harris v. Harris*, 3 Atk. 722.

(*q*) *Neal v. A.-G.*, Mos. 246.

(*r*) *Whatton v. Cradock*, 1 Keen, 267; 6 L. J., N. S., Ch. 178; *Brewin v. Austin*, 2 Keen, 211.

(*s*) *Edwards v. Cunliffe*, 1 Mad. 287; *Jones v. Creswicke*, 9 Sim. 304; *Monkhouse v. Corporation of Bedford*, 17 Ves. 381.

(*t*) *Brewin v. Austin*, 2 Keen, 211; *Whatton v. Cradock*, *supra*; notwith-

standing *Bruere v. Wharton*, 7 Sim. 483.

(*u*) *Whitfield v. Roberts*, 7 Jur., N. S. 1268. In *Wilkinson v. Charlesworth*, 2 Beav. 470, interest was given on the principal only, though the time for payment had been allowed to expire.

(*x*) *Jacob v. Earl of Suffolk*, Mos. 27; *Kelly v. Lord Bellow*, 4 Bro. P. C. 495.

brought forward by petition ; which is only proper for carrying out the directions of the decree (*y*).

*Of the Right to set off Interest.*

1584. If the mortgagee purchase and take possession of the estate, and no interest be paid either on the mortgage debt or the purchase-money before completion, there will be a set-off pro tanto from the date of possession ; and the interest will be payable on the balance of the purchase-money only (*z*). But the devisee of the mortgagor is not entitled, on redemption, to set off the arrears of interest on a legacy bequeathed by the mortgagee to the mortgagor, against the amount due on the mortgage ; because set-off does not take effect *ipso jure*, or without a process in our courts, but the debts subsist notwithstanding the cross demands, and may be separately assigned ; and if the mortgagor had sold the estate subject to the mortgage, the purchaser could not have come for such an account. It seems, however, that before the death of the mortgagor, the set-off might have been directed, upon taking the accounts (*a*).

Where incumbrancers had enforced their lien against the assignees of the bankrupt's estate, in a Chancery suit, in which the subject of the security had been sold, and the proceeds applied in reduction of the debt, the mortgagees, in proving for the residue, were allowed to set off the income of property accruing after the bankruptcy, against the interest on the debt since the same period (*b*). And where there is delay in carrying out the order for sale, the equitable mortgagee may apply the rents in reduction of interest accruing after the order, and to the date of the account (*c*), though generally he cannot have or prove for it beyond the date of the order of adjudication (*d*).

(*y*) *Crenzé v. Hunter*, 2 Ves. jun. 164 ; *Goodyere v. Lake*, Ambl. 584 ; and see in *Lord Middleton v. Eliot*, 15 Sim. 531.

(*z*) *Wallis v. Bastard*, 4 De G., M. & G. 251.

(*a*) *Pettat v. Ellis*, 9 Ves. 563.

(*b*) *Penfold, Exp., Barker, Re*, 4 De G. & S. 282.

(*c*) *Ramsbottom, Exp.*, 4 Dea. & Ch. 198 ; 2 Mont. & A. 79 ; 4 L. J., N. S., Bank. 33.

(*d*) *Badger, Exp.*, 4 Ves. 165 ; *Lubbock, Exp.*, 9 Jur., N. S. 855.

*Of the Right to Arrears of Interest under the Statutes of  
Limitation.*

**1585.** It was provided by 3 & 4 Will. 4, c. 27, s. 42, that after the 31st day of December, 1833, no arrears of rent or of interest in respect of any sum of money charged upon, or payable out of, any land or rent (which includes the interest of a married woman in the proceeds of land devised in trust for sale (*f*)), or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent (**1200**); provided that where a prior incumbrancer (which includes a judgment creditor (*g*)), but not a trustee holding outstanding interests upon trust for the person claiming the benefit of the proviso (*h*)), shall have been in possession or receipt of the rents and profits within one year before an action or suit shall be brought by a *puisné* incumbrancer of the same land, the *puisné* incumbrancer may recover in such action or suit the arrears which have become due during the whole period of the prior incumbrancer's possession or receipt, though such time may have exceeded six years (**1588**).

Before the day appointed for this act to take effect, viz., on the 1st of June, 1833, another act, being c. 42 of the same session of parliament, came into force; by which twenty years was assigned (s. 3) as the time of limitation for actions of covenant or debt upon any bond or specialty, and this, which was at first confined to England, was in 1840 extended to Ireland by 3 & 4 Vict. c. 105, s. 32.

The construction of these enactments is (*i*), that no more

(*f*) *Bowyer v. Woodman*, L. R., 3 Eq. 318.

(*g*) *Henry v. Smith*, 2 D. & War. 390.

(*h*) *Chinnery v. Evans*, 11 H. L. C. 115.

(*i*) *Paget v. Foley*, 2 Bing. N. C.

679; 3 Sc. 120; *Strachan v. Thomas*,

*Sims v. Thomas*, 12 A. & E. 536; *Harrisson v. Duignan*, 2 D. & War. 295; *Hodges v. Croydon Canal Co.*, 3 Beav. 86; *Hunter v. Nockolds*, 1 Mac. & G. 641; 1 H. & Tw. 644; 19 L. J., N. S., Ch. 177; *Hughes v. Kelly*, 3 D. & W. 482; *Humfrey v. Gery*, 7 C. B.

than six years' arrears of rent or interest can be recovered against the land, by force of 3 & 4 Will. 4, c. 27, s. 42, in respect of any sum charged upon, or payable out of, any land or rent; unless the existence of a trust to secure the debt and interest brings the case within the exception as to express trusts (*j*), provided by sect. 25 of the same act; and that under 3 & 4 Will. 4, c. 42, and the Irish act, interest may be recovered for twenty years by action of covenant or debt on the specialty.

**1586.** Before the courts had arrived at the conclusion above pointed out, as to the true construction of these statutes, it had been held (*k*) by Sir J. Wigram, V.-C., that the provision of c. 42 of 3 & 4 Will. 4, was an exception out of the enactment of c. 27, not merely—as limited by these authorities—enabling the interest of money charged on land, and secured by specialty, to be recovered against the person of the debtor, by action on the bond or covenant, but that it was a complete exception for all purposes; so that where the debt was secured by specialty, the twenty years' interest might be recovered, as well against the land, as against the person of the debtor. This, as a general decision, cannot now be supported; but so far as it rested upon the particular circumstances of the case (and the Vice-Chancellor's observations show that in a great measure, though perhaps, not entirely, it did rest upon those circumstances), it appears to remain unaffected by the other authorities. In the case before V.-C. Wigram, the author of the incumbrances was not alive, as he was in the later case of *Hunter v. Nockolds* (*l*). Now, we have seen, that although a mortgagee cannot tack the covenant or bond of the mortgagor against him to the mortgage, yet to avoid circuitry

R. 567; *Young v. Lord Waterpark*, 13 Sim. 204; 15 L. J., N. S., Ch. 63; *Cox v. Dolman*, 2 De G., M. & G. 592; *Snow v. Booth*, 2 K. & J. 132; 8 De G., M. & G. 69; *Shaw v. Johnson*, 1 Dr. & Sm. 412; *Lewis v. Duncombe*, 29 Beav. 175; 7 Jur., N. S. 695; *Round v. Bell*, 30 Beav. 121; 7 Jur., N. S. 1183.

(*j*) But as to express trusts, see now the Judicature Acts, 36 & 37 Vict. c. 66, s. 25 (2); 37 & 38 Vict. c. 83, s. 2; and the Real Property Limitation Act, 1874, 37 & 38 Vict. c. 57, s. 10 (572).

(*k*) *Du Vigier v. Lee*, 2 Hare, 326; 12 L. J., N. S., Ch. 345.

(*l*) 1 Mac. & G. 640.

he may do so against the heir (1014): and all the authorities show that though the mortgagee can recover but six years' arrears of interest against the mortgaged estate, he may recover for twenty years under the covenant. Part therefore of the debt may be considered to be secured by the mortgage, and other part by the specialty; and the mortgage debt, and the specialty debt, may accordingly be tacked against the heir of the mortgagor, where he is bound by the covenant (*m*); provided there be no creditors, or persons having a lien on the estate subsequent to the mortgage, whose rights, according to the rule of tacking just referred to, would interfere with this process. And this, it seems, may be done in a redemption suit (*n*), although no case for tacking have been made on the pleadings, for there the court puts the mortgagor, who is seeking relief against the legal rights of the mortgagee, upon the terms of paying all that is due; but in a foreclosure suit the court, although recognizing the right to tack the interest, whether by virtue of a covenant contained in the mortgage or in some other deed, has refused to allow it, where no case was made for that kind of relief on the pleadings (*o*).

**1587.** The 42nd section of 3 & 4 Will. 4, c. 27, does not apply to an annuity charged on personal estate, the yearly payments not being considered as interest in respect of a legacy (*p*). But it applies to an annuity payable out of land by virtue of the words "arrears of rent;" because the interpretation clause speaks of annuities charged on, or payable out of, land. It has been held (*q*), in a suit by a mortgagor, to recover the surplus of purchase-money arising from the sale of the estate by the mortgagee, that the latter, by reason of the statute, could retain only six years' arrears of interest;

(*m*) *Du Vigier v. Lee*, 2 Hare, 326; 12 L. J., N. S., Ch. 345; *Elvy v. Norwood*, 5 De G. & Sm. 240; 16 Jur. 493; 21 L. J., N. S., Ch. 716. In *Shaw v. Johnson*, the mortgagor was also living and the case was taken out of the statute by the existence of a trust. (1 D. & Sm. 412.)

(*n*) *Elvy v. Norwood*, *supra*.

(*o*) *Sinclair v. Jackson*, 17 Beav. 405. But *Du Vigier v. Lee* was a foreclosure suit, and no such case was made.

(*p*) *Ashwell's Will*, Re, Joh. 112; *Roch v. Cullen*, 6 Hare, 531.

(*q*) *Mason v. Broadbent*, 33 Beav. 296.

it being apparently assumed that the mortgagor could have redeemed on payment of interest for that time. But the statute points to a proceeding by the mortgagee to recover interest; and it has been observed that it does not follow, because a mortgagee who has allowed his interest to run in arrear for more than six years before suing, is limited to interest during that period, that a mortgagor who has lost his legal right and comes for redemption is to get an advantage for his neglect to pay interest. It was, therefore, concluded that the mortgagor's bill to recover the surplus purchase-money is not a suit for the recovery of money; and in a suit to administer the mortgagee's estate, a petition to apply the produce of the sale of the mortgaged estate according to the rights of the parties, was held not to be a proceeding to recover interest within sect. 42 of the statute; and the whole of the arrears were ordered to be paid to the mortgagee (*r*).

A petition for payment of the debt out of money paid into court for the purchase of the estate under compulsory powers is analogous to a suit for the recovery of the debt, and the mortgagee can only recover six years' arrears (*s*). The words "the person by whom the same was payable" (sect. 42), denote, not merely the mortgagor, who is the person legally bound to pay the interest, but all persons against whom payment of the arrears may be enforced by any action or suit. They therefore include subsequent incumbrancers, by whom the interest may properly be said to be payable, because they are entitled to pay it in redemption of the prior mortgage, and are liable to be made defendants to a suit in equity to compel payment out of the land. And where there are successive incumbrances, the acknowledgment of the mortgagor alone will not, under this section, keep alive the right of the first incumbrancer to arrears of interest beyond the period fixed by the statute, to the detriment of later incumbrancers who have not made any acknowledgment (*t*) (563).

Judgment debts are clearly debts charged upon land within

(*r*) *Edmunds v. Waugh*, L. R., 1 Eq. 418.

(*s*) *Stead, Re*, W. N. 1876, 160.

(*t*) *Bolding v. Lane*, 1 De G., J. & S. 122; 9 Jur., N. S. 506; overruling S. C. 3 Gif. 561; 8 Jur., N. S. 407.



the act 3 & 4 Will. 4, c. 27, s. 42, and the interest on them is interest within that section, and is, therefore, recoverable for six years only (*u*); and the rights of the judgment creditors to arrears of interest are co-extensive against the real and personal estate, there being no more right against the personal than against the real estate.

**1588.** The exception in 3 & 4 Will. 4, c. 27, s. 42, as to the possession or receipt of the profits of land, by a prior incumbrancer (**1585**), relates not merely to the actual land, or property which is held by the prior mortgagee, but also to the estate or interest therein of the person in respect of whose debt possession has been taken. Therefore (*v*) the judgment creditor of a remainderman cannot have the benefit of the exception, so as to get interest beyond six years, on the ground that an incumbrancer of the tenant for life has been in prior possession; for if the possession had been vacant as to incumbrancers, the judgment creditor of the remainderman could not have entered in the time of the tenant for life. The exception is only in favour of persons who are waiting, being unable to come in during a prior possession, but who come in within a reasonable time after that possession is at an end. And apart from the plain equity of this doctrine the case appears to be met by the interpretation clause of the act, which extends the meaning of the word "land" to any share, estate or interest in the several kinds of property which it includes. So that the exception may be read thus, "where any prior mortgagee, &c. shall have been in possession of any share, estate or interest in land, &c. within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage, &c. *on the same estate, share or interest.*"

This exception states the only case in which it was intended to relieve the creditor from the effect of the previous enactment.

**1589.** The court will not, to avoid circuity of action,

(*u*) *O'Kelly v. Bodkin*, 3 Ir. Eq. R. 390; *Henry v. Smith*, 2 Dru. & W. 381; overruling *Kealy v. Bodkin*, (*v*) *Sausse & S.* 211. *Vincent v. Going*, 1 Jo. & Lat. 697.

enforce an obligation indirectly where the consequence would be an evasion of the Statute of Limitations. Therefore, where an annuitant filed a bill to raise the arrears of his annuity against a purchaser, subject to the annuity, of the estate charged, an account of arrears for more than six years was refused (*w*), though the result was to drive the annuitant to sue the personal representatives of the grantor of the annuity, upon his covenant, at law, for twenty years' arrears; the representatives so sued being entitled to sue the purchaser again, in equity, in respect of their testator's right to an indemnity against the covenant; which circuitry might have been avoided, by enforcing the same obligation against the purchaser in the first suit. The decision, however, rested much on the circumstances that the covenantor's representatives were not parties to the suit, that the obligation was personal only, and that there was no proof that the covenantor's estate was damnified.

The 42nd section of the statute, as we have already had occasion to observe, is affected by the 25th section, which relates to cases of express trust (569).

1590. It has been determined in England (*x*), that a foreclosure suit, although in terms it only seeks the exclusion of an equity, is in substance a suit for the recovery of the mortgage money, and as such falls within sect. 40 of 3 & 4 Will. 4, c. 27; but this opinion, though at first (*y*) accepted by Lord St. Leonards, was afterwards dissented (*z*) from by him; because, he observes, a foreclosure suit does by no means necessarily, though it may incidentally, lead to the payment of the money; but the act applies strictly to an action or suit to recover the money secured by any mortgage, &c. The terms of the 42nd section are different; the language being that no arrears shall be recovered by any distress, action or suit, not by any suit for the recovery of the arrears. Now if, in a foreclosure suit, the principal and twenty years' arrears of interest be

(*w*) *Harrison v. Duignan*, 2 D. & War. 295.

(*x*) *Dearman v. Wyche*, 9 Sim 575.

(*y*) *Henry v. Smith*, 2 D. & W. 387.

(*z*) *Wrixon v. Vize*, 3 D. & W. 104.

paid off, those arrears are recovered by the suit, and are, therefore, within the very words of the act (*a*).

A mortgage of a canal, with the works and rates, is within the act 3 & 4 Will. 4, c. 27, and six years' arrears of interest only are recoverable against the mortgaged property (*b*); but the tolls of a turnpike are not an interest in land within the act (*c*).

**1591.** The operation of the statute as to interest, or arrears of an annuity, will not be hindered by a mere finding that the estate is subject to an incumbrance (*d*); but it will be otherwise if the person entitled to the charge be a party to the inquiry, and have carried in a claim upon which the finding was grounded (*e*).

### *Of the Rate of Interest.*

**1592.** Where the security does not expressly provide for payment of interest after the time fixed for redemption, interest at the rate reserved to the time of payment will still be recoverable,—not on the contract, but as damages (*f*) for detention of the debt (**15**); and therefore only to the extent of the damages laid. The mortgagor therefore, to avoid the payment of subsequent interest, must be prepared to pay at the day fixed, and must give notice that he will do so.

It is a well-settled, if not an intelligible rule, that if the mortgagee will stipulate for a higher rate of interest, in default of punctual payment, he must reserve the higher rate as the interest payable under the mortgage, and provide for its reduction in case of punctual payment (*g*); and cannot effect his object, by reserving the lower rate, and making the higher the penalty

(*a*) *Sinclair v. Jackson*, 17 Beav. 405; *Du Vigier v. Lee*, 2 Hare, 326.

(*b*) *Hodges v. Croydon Canal Co.*, 3 Beav. 86.

(*c*) *Mellish v. Brooks*, *id.* 22; and see *Langham's Trust*, Re, 10 Hare, 446.

(*d*) *Harrison v. Duignan*, 2 D. & War. 295.

(*e*) *Greenway v. Bromfield*, 9 Hare, 201.

(*f*) *Price v. G. W. R. Co.*, 16 M. & W. 244; 16 L. J., N. S., Ex. 87; *Morgan v. Jones*, 8 Exch. 620; 22 L. J., N. S., Ex. 232; *Watkin v. Morgan*, 6 C. & P. 661; *Cook v. Fowler*, L. R., 7 E. & I. App. 27.

(*g*) *Strode v. Parker*, 2 Vern. 316; *Jory v. Cox*, Pre. Ch. 160; *Walmesley v. Booth*, Barn. Ch. 481.

for non-payment at the appointed time; because, it is said, an agreement of the latter kind, being *nomine pænæ*, is relievable in equity (*h*).

Where the provision is general the mortgagor cannot have the benefit of the provision for the smaller rate of interest, unless he strictly perform the condition; he will have no relief after the time of payment has passed (*i*). But if it be provided, that, *as often as* interest shall be paid within the limited time, the lower rate shall be accepted, or some equivalent words be used pointing to any payment of interest, the mortgagor will not, by a single breach of the condition, lose his right to the benefit of it on future payments, but only upon that particular occasion (*h*).

**1593.** It has, however, been supposed (*l*), that the rate of interest may be raised, if it be done as the price of the mortgagee's forbearance, the additional interest being then looked upon, not as a penalty, but as a liquidated satisfaction agreed upon by the parties. And for this doctrine, two decisions have been cited as authorities. In the one (*m*), the mortgage money, which consisted of debts already due to creditors, was made payable by instalments, with interest at 5*l.* per cent.; and there was a covenant, that if the money were not paid at the appointed times, or within three months after, the mortgagor, for every sum so unpaid, should pay 8*l.* per cent. until actual payment. The Court of Chancery decreed no more than 5*l.* per cent. interest; but the House of Lords, on appeal, directed interest at that rate to be computed upon every instalment for three months

(*h*) *Holles v. Wyse*, 2 Vern. 289; *Strode v. Parker*, id. 316; *Nicholls v. Maynard*, 3 Atk. 519. But there will be no relief in equity under an agreement not to call in a mortgage on punctual payment of interest, though it be but two or three days in arrear. (*Hicks v. Gardner*, 1 Jur. 541.)

(*i*) *Bonafous v. Rybot*, 3 Bur. 1375; *Jory v. Cox*, Pre. Ch. 160; *Stanhope v. Manners*, 2 Ed. 196. A trustee is justified in accepting the lower rate, after the higher rate has become pay-

able by the strict terms of the contract, it being the usual course to treat interest paid under such circumstances as having been paid within the time fixed. (*Booth v. Allington*, 26 L. J., N. S., Ch. 138; 3 Jur. N. S. 49.)

(*h*) *Stanhope v. Manners*; see *Burrowes v. Molloy*, 2 Jo. & Lat. 521; *Wayn v. Lewis*, 25 L. T. 264.

(*l*) Pow. Mort. 901, ed. 6.

(*m*) *Burton v. Slattery*, 5 Bro. P. C. 233.

after it became due, and from the end of every three months interest at 8*l.* per cent. was allowed according to the deed. But this decree was made *ex parte*, the respondent not having appeared, and no case having been printed for him. Not a word was said of forbearance, nor is any reason given for the judgment, and it is not clear how a question of forbearance could arise, or why the reservation was less a penalty than in other cases.

The other case (*n*) in question certainly seems to have turned upon forbearance, but it was after the arrear of interest had accrued; the mortgagor on an account of principal and interest stated, having desired the forbearance of the mortgagee, and promised satisfaction; upon which promise the court laid hold, and compelled the mortgagor to perform it by paying the higher rate of interest, which in one way or another was reserved by the security in default of punctual payment. Now, that upon an agreement made after interest has become due it may be turned into principal, we have already seen (1578). No doubt, therefore (*o*), the parties may stipulate in like manner for a higher rate of interest, but that does not touch the question of enforcing a penalty, entered into *before* interest has become due; and the case is nothing to the purpose. It is also ill-reported and contradictory, for the statement is that the mortgage was at 6*l.* per cent., with a proviso to take 5*l.*, which was valid. But Parker, L. C., is twice made to say in his judgment, that the proviso obliged the party to pay 6*l.* per cent., in default of paying 5*l.*, which was a penalty, and relievable.

In the same case it was said, that though the penalty were relievable if only a very short time had happened, it might not be so in case of a long arrear of interest; and that on a written promise to make satisfaction for forbearance, the court would give the mortgagee some allowance in case of a great arrear of interest, even though no penalty were reserved.

In a case (*p*), heard before the Lords Commissioners in 1690,

(*n*) Brown v. Barkham, 1 P. Wms. 652. Parker, L. C., in this case.  
 (*p*) Marquis of Hallifax v. Higgins, 2 Vern. 134.

(*o*) See the concluding remarks of

where 5*l.* per cent. was reserved, and the mortgagor covenanted to pay 6*l.* per cent. if he made default for sixty days after payment, the doctrine above stated was not acted on, but 6*l.* per cent. interest was decreed; for the covenant, it was said, was the agreement of the parties, and not to be relieved against as a penalty; but this decision, however judicious in substance, has been clearly overborne by the current of later authorities. The case has been supposed to be misstated (*q*), but it agrees with the registrar's book; yet it is singular that in the subsequent case of *Holles v. Wyse* (*r*), it is said that the interest in *Hallifax v. Higgins* was reserved at 6*l.* per cent., with an agreement to accept 5*l.*; and the yet later case of *Strode v. Parker* (*s*) seems to imply the same.

Lord Eldon, referring to the subject by way of illustration only (*t*), took quite a different view of the doctrine; treating the reservation of the higher interest as a penalty, whether it were reserved only on non-payment, or originally, with an agreement for reduction on punctual payment; and saying that in either case relief might be had in case of non-payment at the time, by paying the lesser rate of interest, and putting the mortgagee in the same position as if it had been paid at the time by giving him interest upon the unpaid interest. But although this view of the matter is entitled to great respect, it was only put forward extrajudicially, and does not seem to be consistent with any reported cases.

**1594.** Where no rate of interest is fixed by the parties, the court can fix it, and will adopt the current rate of 5*l.* per cent. (*u*); which also appears to be the proper rate, where an absolute deed is cut down to a security under circumstances analogous to those which were formerly applied in cases of

(*q*) Powell, Mort. 901, n. (*l*).

(*r*) 2 Vern. 289.

(*s*) Id. 316.

(*t*) Seton v. Slade, 7 Ves. 273.

(*u*) Ashwell v. Staunton, 30 Beav. 52. In the case of "The Change," 29 L. T. 147, Swab. Ad. 240, the court refused to add to a written in-

strument by admitting evidence as to the rate of interest agreed to be taken on a bottomry bond, but pronounced for such a rate as the risk would command at the time and place where the bond was made, and referred the question to the registrar and merchants.

usury (*v*). In the case of further advances, or of money allowed in the nature of further advances, the interest is generally given at the same rate as upon the monies originally lent (*x*). It has, however, been directed to be computed after the rate current in a foreign country, where the money was expended; the current rate there being less than the interest reserved by the mortgage (*y*); but if it were otherwise, it is presumed that the rate of interest reserved by the mortgage would be adopted, as in ordinary cases.

**1595.** An unwritten agreement to reduce the rate of interest on a mortgage is good; but in the absence of evidence or presumption of such an agreement, the difference between the rate reserved and that actually paid must be made good (*z*). So if a higher rate than is reserved be paid, the excess may be deducted on discharge of the mortgage (*a*).

The mortgagee in possession will be allowed only the lower rate of interest reserved on punctual payment (*b*).

**1596.** In the days of the usury laws, no more than the legal rate of interest was allowed in England on a mortgage of land in a foreign country, where greater interest was lawful; and upon a legacy charged on land in such a country, no greater interest was given as a matter of discretion (*c*). And, as a general rule, in other cases, where there is no question arising from the employment of money in trade, or from other exceptional circumstances, the court allows interest upon money at 4*l.* per cent. (*d*). And even where a mortgagee, who had been let into possession till he should be paid the

(*v*) See *Douglas v. Culverwell*, 4 De G., F. & J. 20; 31 L. J., Ch. 544; *Unsworth, Re*, 2 D. & S. 337.

(*w*) *Woolley v. Drag*, 2 Anst. 551.

(*y*) *Quarrell v. Beckford*, 1 Mad. 281; and see *Badham v. Odell*, 4 Bro. P. C. 349.

(*z*) *Lord Milton v. Edgworth*, 5 Bro. P. C. 313; *Gregory v. Pilkington*, 26 L. J., Ch., N. S. 177; 8 De G., M. & G. 616.

(*a*) *Tyler v. Manson*, 5 L. J., Ch. 34.

(*b*) *Stains v. Banks*, 9 Jur., N. S. 1049.

(*c*) *Stapleton v. Conway*, 1 Ves. 427; and see 2 Bur. 1095.

(*d*) 1 Bro. C. C. 386; 2 Ves. 239; *Archdeacon v. Bowes*, M'Clel. 149; *Heathcote v. Hulme*, 1 J. & W. 122. But 5*l.* per cent. in Ireland. (*Leslie v. Leslie*, Ll. & Goo. temp. Sugd. 1; *Simpson v. O'Sullivan*, 3 D. & War. 459.)

sum lent and interest, held over, being overpaid for thirty-four years, he was only charged (*e*) with interest at 4*l.* per cent., though he had purchased part of a prior mortgage on the same estate, which had been paid off with interest at 5*l.* per cent.

*When Interest ceases.*

**1597.** The mortgagee is entitled to six months' interest from the date of the notice to him of the intended discharge of the security, unless he have demanded or taken proceedings to recover payment (**1272, 1273**); and whether notice of payment were given by the mortgagor or the mortgagee, if the payment be not made at the time fixed, the mortgagee is entitled to a new notice or to six months' additional interest from the time of actual payment (*f*). Where the mortgagee assents in an administration suit to a sale of the mortgaged property, he will have interest for six months from the date of the assent, if the mortgage be discharged before the end of that time; but if it be not, interest runs to the time of payment (*g*).

If the mortgage cannot be discharged at the time fixed, by reason of the inability of the mortgagee to produce the deeds; or if in a redemption or foreclosure suit he omit to attend at the time and place fixed for payment, he will be allowed no interest beyond that day; but where the omission arose from a mistake, and the mortgagor also neglected to attend, the mortgagee was not compelled to wait another six months; but a new time was fixed for payment at the end of ten days (*h*).

**1598.** Interest will cease to run upon the mortgage debt from the time at which a proper tender of the whole amount due is shown to have been made (*i*). But it ought to appear,

(*e*) *Archdeacon v. Bowes*, M'Clel. 149; *Montgomery v. Calland*, 14 Sim. 79.

(*f*) *Bartlett v. Franklin*, 15 W. R. 1077.

(*g*) *Day v. Day*, 31 Beav. 270.

(*h*) *Lord Middleton v. Eliot*, 15 Sim.

581; 11 Jur. 743; *Hughes v. Williams*, Kay, App. IV., and form of order there.

(*i*) *Lutton v. Rodd*, 2 Ch. Ca. 206; *Robarts v. Jefferys*, 8 L. J., Ch. 137; *Cliff v. Wadsworth*, 2 Y. & C. C. C. 598.



that, from the time of the tender, the money was kept ready by the mortgagor, and that no profit was afterwards made of it; upon proof of the contrary whereof the interest will still run (*k*).

And there must be an actual tender of the money due (*l*) (1277). The court will not stay the interest on proof of a proposal by the mortgagor, where money is due to him from the mortgagee on another account between them, to satisfy the mortgage by deducting the sum due thereon from the other debt (*m*). Executors who refuse a proper tender on the ground that they have not proved the will can demand no further interest, because they may receive the money before probate (*n*).

1599. If the right to redeem be disputed, and an inquiry becomes necessary, the mortgagee is not to lose his interest, pending the inquiry, although a tender have been made (*o*).



## CHAPTER XI. PART 3.—OF ACCOUNTS OF COSTS.

1600. *Of the General Right of the Mortgagee to Costs.*

1615. *Of the Costs under a Decree for Sale.*

1618. *Of the Equitable Mortgagee's Right to Costs.*

1626. *Of the Costs of the Incumbrancers under the Lands Clauses Consolidation Act.*

1628. *Of the Mortgagee's Right to Costs and Expenses disbursed.*

1640. *Of the Mortgagee's Liability to Costs incurred by the Loss of the Deeds.*

1641. *Of Costs arising out of Assignments pendente lite.*

1642. *Of the Costs of Re-conveyance.*

1649. *Of the Right of disclaiming Parties to Costs.*

1658. *Of adding Costs to the Debt after Judgment.*

1660. *Of Solicitor's Costs.*

1663. *Of Costs upon staying Proceedings.*

1600. It is a general rule, concerning the costs of suits for redemption, and for foreclosure, or otherwise relating to ques-

(*k*) Lutton v. Rodd, *supra*; Gyles v. Hall, 2 P. Wms. 379.

(*l*) Church v. Bishop, 2 Ves. 371.

(*m*) Garforth v. Bradley, 2 Ves. 675.

(*n*) Austin v. Dodwell's Executors, 1 Eq. Ca. Abr. 319.

(*o*) Sharpnell v. Blake, 2 Eq. Ca. Abr. 604.

tions between the mortgagor and mortgagee, that the latter is entitled to be repaid such of the costs as originally fall upon himself; and they are accordingly added to the amount due upon his security, and with the principal and interest form part of a single debt, and are all payable in the same priority (*p*). And the Court, assuming a jurisdiction over the whole subject-matter of the security, in like manner suffers the mortgagee to add to his debt all such costs as have been incurred by him in any action of ejectment, or other proceeding, for the recovery of the estate, or for the establishment or defence of the mortgage title (*q*) (1628). So costs incurred in respect of one estate may be added to the debt due upon another, of which redemption is decreed; as where (*r*) a mortgagor sought to redeem two estates, upon only one of which redemption was decreed, such of the costs as related to the estate, in respect of which no relief was granted, were added to the amount due upon the redeemable security, although the plaintiff sued in formâ pauperis. And if one of two mortgagees file a bill for foreclosure, the other being a defendant, the decree will direct foreclosure on default of payment of the whole debt, and the costs of both mortgagees (*s*).

1601. A person in whom the mortgagee's interest in the security has become vested, such as a judgment creditor, (and à fortiori where there is an absolute assignment,) is substituted for him in respect of the right to costs. And where the equity of redemption is vested in trustees, to sell and pay off the mortgage, and dispose of the surplus, the judgment creditor of the mortgagee, suing for a sale, is entitled (*t*) to be paid his debt

(*p*) He may also add to his debt the costs of his trustee, who is made a defendant to a foreclosure suit. (*Browne v. Lockhart*, 10 Sim. 426.) And the costs of the mortgagee's appeal when the decision appealed from is reversed. (*Addison v. Cox*, L. R., 8 Ch. 76.)

(*q*) *Detillin v. Gale*, 7 Ves. 583; — *v. Trecothick*, 2 Ves. & B. 181; *Barnes v. Racster*, 1 Y. & C. C. C. 403; *Dunstan v. Patterson*, 2 Ph. 341; Lord

*Midleton v. Eliot*, 15 Sim. 531. The costs of proceedings at law by an incumbrancer have also been given to the debtor in a suit in equity, in which the securities were set aside. (*Stanley v. Bond*, 6 Jur. 423.)

(*r*) *Batchelor v. Middleton*, 6 Hare, 86.

(*s*) *Davenport v. James*, 7 Hare, 249.

(*t*) *Clare v. Wood*, 4 Hare, 81.

and costs in priority both to the mortgagee and the owners of the equity of redemption, and subject only to the costs of the trustees.

**1602.** Defendants in suits to set aside unconscientious dealings with reversions and on post-obit securities were formerly considered, in respect of their right to costs, as mortgagees (*u*). And costs are not now given against them except in case of misconduct (*v*). The plaintiff in such a suit will be made to pay the costs occasioned by charges of fraud which he does not substantiate (*x*).

**1603.** Although the mortgagor himself is bound to indemnify the estate against expenses incurred in protecting the title, so long as the equity of redemption remains with him (*y*), yet as against a puisné mortgagee, or other purchaser or trustee of the equity of redemption, the first mortgagee has generally nothing beyond the common right of adding the costs to his debt (*z*); even though expenses have been incurred by the argument of a question raised by the puisné mortgagee, which was not material to the merits of the cause: though the costs occasioned by an unsuccessful objection to the mortgagee's right to sue may be thrown on the defendant (*a*), and so may the costs of a suit which the incumbrancer has been obliged to institute by reason of subsequent dealings with the estate by the owner of the equity of redemption without giving notice of the charge (*b*).

**1604.** Though costs thus naturally follow the redemption, it may be that where the right to redeem is disputed, and the question is doubtful, no costs will be given on either side (*c*). And

(*tt*) *Bowes v. Heaps*, 3 Ves. & B. 117; *Marsack v. Reeves*, 6 Mad. 109.

(*v*) *Tottenham v. Green*, 32 L. J., N. S., Ch. 201.

(*w*) *Edwards v. Burt*, 2 De G., M. & G. 55; *St. Albyn v. Harding*, 27 Beav. 11; *Foster v. Roberts*, 29 Beav. 467.

(*y*) *Langton v. Langton*, 18 Jur.

1092; rev. on principal point, 1 Jur., N. S. 1078.

(*z*) *Frazer v. Jones*, 5 Harc. 475; *Philips v. Davies*, 7 Jur. 52.

(*a*) *Tildesley v. Lodge*, 3 Jur., N. S. 1000.

(*b*) *Wise v. Wise*, 2 Jo. & Lat. 403.

(*c*) *Kirkham v. Smith*, 1 Ves. 257.

where the right to foreclose depended upon the construction of a deed, which was held to be in the nature of a Welsh mortgage, the suit was dismissed without costs (*c*).

And there are several exceptions to the rule, under which a mortgagee is entitled to add his costs to the debt, which extend, not merely to deprive him of that right, but also to compel him to pay costs. But the court departs from the general rule with some reluctance, and seems formerly to have even doubted its power to throw costs upon the mortgagee (*d*). The jurisdiction has now for a long time been fully established. But the mortgage being a security, not only for principal and interest and the ordinary charges and expenses usually provided for by the instrument, but also for the costs properly incident to a suit for foreclosure or redemption, the mortgagee's right to the benefit of the contract can only be lost or curtailed by such inequitable conduct as amounts to a violation or culpable neglect of his duty under it (*e*). And a claim by the mortgagor, that the mortgagee shall pay the costs, should be included in the original inquiry, for the court will not attend afterwards to evidence upon the subject (*f*).

**1605.** The order for payment of costs by the mortgagee is not necessarily an order for personal payment; he may be allowed to add the costs to his debt (*g*), or they may be set off against the amount payable to him in respect of his debt (*h*); and when such costs become payable in a puisné mortgagee's suit to redeem, the uncertainty whether he will do so when the accounts are taken is a reason for setting off the costs against the debt of the prior mortgagee, who is ordered to pay them (*i*).

**1606.** A direction to tax the mortgagee the costs of the suit,

(*e*) *Teulon v. Curtis*, Younge, 610.

*Jones*, C. P. Coop. 498.

(*d*) *Franklyn v. Fern*, Barn. Ch. 30;  
*Detillin v. Gale*, 7 Ves. 586.

(*g*) *Pelly v. Wathen*, 7 Hare, 372.

(*e*) *Cotterell v. Stratton*, L. R., 8 Ch. 295.

(*h*) *Banks v. Whittall*, 1 De G. & S. 541; *West v. Jones*, 1 Sim., N. S. 218.

(*f*) *Dunstan v. Patterson*, 2 Ph. 341;  
16 L. J., N. S., Ch. 404; *Wright v.*

(*i*) *Whcaton v. Graham*, 24 Beav. 488.

amounts to a direction to pay him his whole costs, without exception as to any part of the cause; and will be so construed, although the mortgagee, by holding over after payment, have made the suit necessary, and although he have raised an improper defence (*j*). The objection to the form of decree should be made at the hearing, for the court will not, on grounds which might then have been urged, review the taxation (*k*).

**1607.** Where a mortgagee, plaintiff in a foreclosure suit, died having made himself liable to costs, and his executors, without reviving, filed a new bill for foreclosure, the court refused to give them any costs in the second suit unless they submitted to pay the testator's costs in the first; though it would not stay proceedings or refuse a decree in the second suit, until payment of those costs (*l*).

Where the costs of the suit, or part of them, would have been thrown upon a mortgagee, being solvent; if he be insolvent, and, therefore unable to pay, he shall not receive any general costs (*m*).

**1608.** The power of giving costs against the mortgagee will be exercised, where the mortgagee has been guilty of gross misconduct or oppression, or even where, without improper motives, he has caused expenses to be incurred which cannot justly be thrown upon the mortgagor. Therefore, if the mortgagee set up an unjust defence (*n*), or resist a bill to redeem on the ground of a foreclosure, collusively obtained, or, if he resist any just claim to redeem, he will be liable to so much of the costs as his improper conduct has caused, though he may be allowed the ordinary costs of redemption (*o*).

(*j*) *Quarrell v. Beckford*, 1 Mad. 269; *Wilson v. Metcalfe*, 1 Russ. 530.

(*k*) *Price v. M'Beth*, 10 Jur., N. S. 579.

(*l*) *Long v. Storie*, 9 Hare, 542; 21 L. J., N. S., Ch. 521.

(*m*) *Rider v. Jones*, 2 Y. & C. C. C. 335.

(*n*) *Mocatta v. Murgatroyd*, 1 P.

Wms. 393; *Baker v. Wind*, 1 Ves. 160; and see *Thornton v. Court*, 4 De G., M. & G. 293; *England v. Codrington*, 1 Ed. 169; *Tomlinson v. Gregg*, 15 W. R. 51.

(*o*) *Harvey v. Tebbutt*, 1 J. & W. 197; *Price v. Berrington*, 7 Hare, 394; see *Harryman v. Collins*, 18 Jur. 501; 18 Beav. 11; and see *Malone v.*

But where he set up an adverse title and failed, he was ordered to pay the whole costs of the suit (*p*). And if the contract under which he claims be illegal (*q*), or if he have been guilty of ill conduct in attempting to deprive another of the benefit of his security, by a dealing behind his back, he may be refused his costs (*r*). The like order has been made where a mortgagee, whose presence was necessary to complete the redemption, and might have removed the difficulty which caused the suit, neglected to attend at the appointed time and place; though, not having actively opposed the redemption, he was not ordered to pay costs (*s*).

**1609.** A mortgagee will also be made to pay the costs occasioned by a claim which he makes, but fails to establish, or by charges of fraud or connivance which he cannot substantiate (*t*); or of a suit by a puisné mortgagee for an account of the produce of a sale, if the defendant have refused to account and the balance be found against him (*u*), as well as of inquiries into the mortgagor's claim for dilapidations, and of evidence of the mortgagee's refusal to account; or he may be deprived of his costs to the hearing (*x*). But he will not be ordered to pay, or forfeit his right to, costs in the absence of misconduct, by merely extending his claim beyond that to which the court adjudges him to be entitled (*y*), or by stipulating that the accounts required shall be furnished at the costs of the mortgagor where they are of a special nature (*z*). Nor will he be made to pay the costs occasioned by a dispute

Geraghty, 3 Dru. & War. 248, 250;  
1 H. L. C. 81; Whitfield v. Parfitt,  
4 De G. & S. 240; Whitbread v. Smith,  
2 De G., M. & G. 727.

(*p*) Roberts v. Williams, 4 Hare,  
129; 11 L. J., N. S., Ch. 65.

(*q*) Johnson v. Williamshurst, 1 L. J.,  
Ch. 112.

(*r*) Taylor v. Baker, Dan. 82.

(*s*) Cliff v. Wadsworth, 2 Y. & C.  
C. C. 598.

(*t*) Montgomery v. Calland, 14 Sim.  
79; Cockell v. Taylor, 15 Beav. 127;  
Green v. Briggs, 6 Hare, 682; West

v. Jones, 1 Sim., N. S. 218; Gregg v.  
Slater, 25 L. J., N. S., Ch. 440; 2 Jur.,  
N. S. 246.

(*u*) Tanner v. Heard, 23 Beav. 555;  
see 3 Jur., N. S. 427.

(*x*) Sandon v. Hooper, 6 Beav. 246;  
Powell v. Trotter, 1 Dr. & Sm. 388.

(*y*) Loftus v. Swift, 2 Sch. & Lef.  
657; Alexander v. Simms, 20 Beav.  
123; Cotterell v. Stratton, L. R., 8 Ch.  
295.

(*z*) Norton v. Cooper, 5 De G., M. &  
G. 728.

as to a fact, where the court gives so much weight to the mortgagee's objection as to direct an issue, although the result be against him (*a*).

**1610.** It is the duty of the mortgagee so to choose his remedy as not to incur unnecessary costs. Where a suit was not originally commenced as, but was afterwards turned into a foreclosure suit, so much of the costs as were incurred before it assumed that form, including the costs of the trial of an issue, by which the plaintiff was found to be mortgagee, were thrown upon him; the bill in its original form having been liable to be dismissed with costs (*b*). And a mortgagee who files a bill for foreclosure in Ireland (which results in a sale) (**825**), will not generally be allowed more costs there than if he had taken the less expensive remedy under the bankruptcy; but it seems that he will not lose his full costs by refusing to abandon his suit commenced before bankruptcy, though the assignees offer him all the costs already incurred (*c*).

So of particular costs incurred by the mortgagee in the suit unnecessarily; as on the refusal of a motion to dissolve an injunction restraining an action at law (to which injunction the plaintiff is clearly entitled), the costs of which have been thrown upon the defendant, although, according to the usual practice, the costs of such motions are costs in the cause; and where the mortgagee, applying for sale in bankruptcy and for the costs of an action at law, was refused them, because by proceeding with the action he would have recovered the costs at law (*d*).

**1611.** The costs incurred by an improper joinder of parties, whether as plaintiffs or defendants, must be paid by the mortgagee (*e*). Thus a bill for sale, in which prior annuitants

(*a*) *Wilson v. Metcalfe*, 3 Mad. 45.

(*b*) *Smith v. Smith*, Cooper, 141; *Briant v. Lightfoot*, 1 Jur. 20; *Phillips v. Davies*, 7 Jur. 52.

(*c*) *Hogan v. Baird*, 4 Dru. & War. 296; *Bernard v. Sadlier*, 4 Ir. Eq. R. 61.

(*d*) *Marsack v. Reeves*, 6 Mad. 109; *Fletcher, Exp.*, Mont. 454; *Cocks v. Stanley*, 4 Jur., N. S. 942.

(*e*) *Pearce v. Watkins*, 5 De G. & S. 317; *Booth v. Creswicke*, 8 Jur. 323; 13 L. J., N. S., Ch. 217.

(1459) were joined, was dismissed as against them with costs, though they appeared at the hearing and consented; because the sale ought to be made subject to their annuities (*f*). And where subsequent incumbrancers were brought forward by the first mortgagee with power of sale, in a suit for sale under the decree of the court, and they appeared and consented, their costs were given out of an estate insufficient for payment of the first mortgage (*g*). But in a case in Ireland, where the executor of a mortgagor was made a defendant to a foreclosure suit, there being no personal assets of the deceased, and a deficient fund, it was stated and held to be the practice not to give such costs to the prejudice of incumbrancers (*h*). The devisee of a mortgagee, who made the heir a party to his foreclosure suit to establish the will against him, was ordered to pay the heir's costs, and not to have them over against the estate (*i*).

1612. Again, if the mortgagee refuse a proper tender, or proceed after payment of all that is due, he does so on peril of paying the costs incurred after the payment or tender (*k*) (1277), whether it were made before or after the filing of the bill, and whether by the mortgagor or one representing him, or by a puisné incumbrancer (*l*). And where the plaintiff in a redemption suit offered to pay the amount found due by the report, with costs to that time, which the defendant refused to accept, the latter was ordered to be paid the costs only up to the date of the report; and it seems to have been merely

(*f*) *Delabere v. Norwood*, 3 Sw. 144, note, and see *Horrocks v. Ledsam*, 2 Coll. 208.

(*g*) *Cooke v. Brown*, 4 Y. & C. 227; 9 L. J., N. S., Ex. Eq. 41; *Alston v. Parker*, 5 L. J., N. S., Ch. 3.

(*h*) *Grace v. Lord Mountmorris*, 2 Dru. & War. 432.

(*i*) *Skipp v. Wyatt*, 1 Cox, 352. But the reason given is not satisfactory.

(*k*) *Shuttleworth v. Lowther*, 7 Ves. 586; *Cliff v. Wadsworth*, 2 Y. & C. C. 598; *Harmer v. Priestley*, 16 Beav. 569; 22 L. J., N. S., Ch. 1041; *Morley*

*v. Bridges*, 2 Coll. 621; *Gregg v. Slater*, 22 Beav. 314. And to save the expense of coming to the court on further consideration, a direction that the mortgagee shall pay the costs, if the sum due does not exceed the tender, may be added to the decree at the hearing. (*Hosken v. Simcock*, 11 Jur., N. S. 477.)

(*l*) *Smith v. Green*, 1 Coll. 564: so decided, although the decree is expressed to be by consent. And see *S. C.* 2 Col. 626, n.



because the case was new, that the defendant was not ordered to pay all the subsequent costs (*m*). But if the mortgagor make no tender, but only state by his answer that he was willing to pay so much as he considered to be due, before the institution of the suit, he will not save the costs, although at the hearing he succeed in establishing his case as to the amount due (*n*).

Where a tender has been made and refused, the application, that the mortgagee may pay the subsequent costs, may be made either by motion or petition at the hearing, supported by affidavits of the tender and refusal (*o*).

**1613.** If the mortgagee institute a foreclosure suit, and upon taking the accounts it be shown that nothing was due at the filing of the bill, or if he drive the mortgagor to institute a suit under like circumstances, he must bear (*p*) the whole expense of the suit; and so if the costs be only occasioned in part by the accounts and inquiries relating to the mortgage debt, and the mortgagee have suppressed facts, a knowledge of which would have led to the discovery that he was overpaid (such as the fact that he has been in possession); or if, being a defendant, he deny by his answer that he is satisfied, when nothing remains due, he must pay the costs of so much of the proceedings as have been caused by his denial or false suggestion (*q*). So where, knowing that he is already overpaid, the creditor contests the mode of taking the accounts and fails (*r*); or causes subsequent proceedings by keeping money and receiving rents, long after his right to receive them as mortgagee in possession has ceased (*s*); he will be allowed such costs only as arose whilst he filled the character of a creditor, and must pay the rest. But, *primâ facie*, the mort-

(*m*) *Sentance v. Porter*, 7 Hare, 426; 18 L. J., N. S., Ch. 448.

(*n*) *Hodges v. Croydon Canal Co.*, 3 Beav. 86; *Gammon v. Stone*, 1 Ves. 339. And see *Broad v. Selfe*, where, under the circumstances, no costs were given on either side to the hearing. (9 Jur., N. S. 886.)

(*o*) *Sentance v. Porter*, supra.

(*p*) *Binnington v. Harwood*, T. & R. 477; *Morris v. Islip*, 23 Beav. 244; *O'Neill v. Innes*, 15 Ir. Ch. R. 527.

(*q*) *Montgomery v. Calland*, 14 Sim. 79; *Snagg v. Frizell*, 3 Jo. & Lat. 383.

(*r*) *Skirrett v. Athy*, 1 Ba. & Be. 434.

(*s*) *Archdeacon v. Bowes*, 13 Price, 353; *McClellan*, 149.

gagee in possession has a right to the costs of a suit instituted to take the account, and it is not merely because there is a difficulty in taking it, not occasioned by his misconduct, or because the result is against him, that he will be deprived of his costs (*t*). Neither will this be done, where he is found to have been overpaid, though he have insisted that a large sum remained due to him, if the decree have been made to include costs in the usual form (*u*).

**1614.** A person who, whether his true character be that of a mortgagee or not, places himself in the position of an accounting party, and so undertakes a duty which he cannot perform, by reason of the loss of vouchers for sums which he has paid, will not have the costs of taking the accounts (*x*),

*Of the Costs under a Decree for Sale.*

**1615.** The decree for the sale of an incumbered estate does not of itself alter the rights of the parties, but the purchase-money being considered to be substituted for the estate, the produce of each separately incumbered estate will be treated in the same manner as the estate (*y*), and each incumbrancer will be paid his costs, including the costs of the petition for payment to him of the produce of the sale, together with his principal and interest, according to priority, the puisné incumbrancer taking nothing until he who is prior has been paid in full; and the costs of the sale will not in the first place, without a special direction, be paid out of the general fund (*z*). The

(*t*) *Snagg v. Frizell*, 3 Jo. & Lat. 383.

(*u*) *Gilbert v. Golding*, 2 Anst. 442.

(*x*) *Price v. Price*, 15 L. J., Ch. 13.

(*y*) *Upperton v. Harrison*, 7 Sim. 444; *Chisum v. Dewes*, 5 Russ. 29; *Barnes v. Racster*, 1 Y. & C. C. C. 401. So *Belchier v. Butler*, 1 Ed. 523; *Wild v. Lockhart*, 10 Beav. 320; 16 L. J., N. S., Ch. 519; *Cook v. Hart*, L. R., 12 Eq. 459; *Wonham v. Machin*, L. R., 10 Eq. 447; 18 W. R. 1098.

(*z*) And if the first incumbrancer have two charges he takes all his costs

with the first. But in Ireland the practice is to give the costs of the puisné incumbrance in priority with it. (*Handcock v. Handcock*, 1 Ir. Ch. R. 444.) In some recent cases it has been held or intimated that the actual costs of the sale ought first to be paid out of the proceeds, because the mortgagee must have incurred them if he had instituted a suit to realize his security. (*Dighton v. Withers*, 31 Beav. 423; *Berry v. Hebblethwaite*, 4 K. & J. 80; and see *Tuckley v. Thompson*, 1 J. & H. 126, but see S. C. on app. 29 L. J.,

mere consent of the mortgagee to the sale will not deprive him of his priority in respect of costs, so long as he insists upon his right against the mortgaged estate (1340); whether that consent be given in a redemption or foreclosure suit, or in a suit (whether the mortgagee be or be not a party thereto) for the general administration of the mortgagor's estate (*a*); or in a suit for carrying out the trusts of a deed, to which the incumbrancer is not a party, for sale of the estate and payment of the costs of the trustees, and then of the incumbrancers according to their priorities (*b*); provided that the mortgagee so consenting be not actively seeking his remedy against the mortgagor's general assets. For if he come in under a suit for administering the whole of the mortgagor's estate, including property (however small) which is not included in his own security, and *à fortiori* if he commence or file a bill for the further prosecution of such a suit; the costs of the sale and of the suit will be treated as costs of administration, and all parties will be paid costs in the first instance; after which the produce of the mortgaged estate will be paid to the mortgagee according to his priority, and as to the rest of his claim he will be paid *pro ratâ* with the other creditors in equal degree (*c*). The same rule has been followed where a mort-

N. S., Ch. 548; and per Turner, L. J., in *Mackinley, Re*, 2 De G., J. & S. 363; 10 Jur., N. S. 1063; 34 L. J., N. S., Ch. 54. It is questionable if this ought to be done, because the suit and sale are for the benefit of the general estate, and the mortgagee consents to the sale at the instance and for the benefit of the owners of the estate, where he might otherwise have been content to rest upon his security.

If the decree have directed that the proceeds of the sale shall be paid to the mortgagee, the costs of the sale cannot afterwards be deducted. (*Id.*) But debenture holders, upon the property of a company under a winding-up order, have priority over the general costs of liquidation, but not over the liquidator's costs of realization. (*Marine Mansions Co., Re*, L. R., 4 Eq. 601;

*Oriental Hotels Co., Re*, L. R., 12 Eq. 126.) In a mortgagee's administration suit, where there was a deficiency, the executor's costs, charges and expenses were ordered to be paid before the mortgagee's costs of sale. (*Spensley's Estate, Re*, L. R., 15 Eq. 16.) But such an order was refused in *Pinchard v. Fellows*, L. R., 17 Eq. 421.

(*a*) *Hepworth v. Heslop*, 3 Hare, 485; *Armstrong v. Storer*, 14 Beav. 535.

(*b*) *Crosse v. General Reversionary and Investment Society*, 3 De G., M. & G. 698.

(*c*) *Brace v. Duchess of Marlborough*, Mos. 50; *Tipping v. Power*, 1 Hare, 405; *Armstrong v. Storer*, 14 Beav. 535; *Ford v. Earl Chesterfield*, 21 Beav. 426. See *Wickenden v. Rayson*, 25 L. J., N. S., Ch. 641.

gagee, being defendant in an administration suit in which the amount of his mortgage was the subject of inquiry, claimed a much larger sum than was found due; upon the principle that in a foreclosure suit, if the mortgagee claimed too much, the costs would have followed the result (*d*). Where, however, a puisné incumbrancer, either by a suit to ascertain the priorities or by proceeding in a dormant suit, is the means of securing and distributing a fund for the benefit of all the incumbrancers, his costs of the suit or proceeding will be paid before the other charges on the fund, though it be no administration suit (*e*).

**1616.** A suit by a cestui que trust against the trustees and mortgagees of the trust fund, in which the title of the plaintiff and the priorities are disputed and inquired into, is a suit for administering the trust estate in which the costs of all parties will first be paid out of the fund, and not a mere suit for redemption (*f*); although the bill originally prayed for payment of the first mortgagee's debt, and of the residue to the plaintiff. But in a suit for foreclosing a mortgage of a term, the mortgagee retains his priority as to costs, though by agreement the reversion be included in the sale (*g*).

**1617.** The owner of a share of an estate and his incumbrancers have but one set of costs, which is received by the first incumbrancer (*h*).

*Of the Equitable Mortgagee's Right to Costs.*

**1618.** An equitable mortgagee, whether with or without a memorandum of deposit, has the same right in equity to add

(*d*) *White v. Gudgeon*, 30 Beav. 545. But it is not said that there was a tender, and it seems that without a tender the mortgagee would not have lost his costs in a foreclosure suit (1612).

(*e*) *White v. Bp. of Peterborough*, Jac. 402; *Ford v. Earl Chesterfield*, supra; *Wright v. Kirby*, 23 Beav. 463;

*Ihler v. Davies*, V. C. S. 9th July, 1864.

(*f*) *Bryant v. Blackwell*, 15 Beav. 44.

(*g*) *Cutfield v. Richards*, 26 Beav. 241.

(*h*) *Remnant v. Hood*, 27 Beav. 613; *Equitable Insurance Co. v. Fuller*, 7 Jur., N. S. 307; *Ward v. Yates*, 1 Dr. & S. 80.

his costs to his debt as a legal mortgagee (*i*); and so has a solicitor who establishes a lien for costs upon documents in his possession (*h*). But the principle does not apply to the case of a solicitor taking a security for his unsettled account, where the charges are shown to be excessive; these costs not being the result of the debtor's endeavour to release his estate from a just demand, but of establishing the fact that he has been overcharged (*l*). The solicitor therefore will pay so much of the costs as relates to the question of the fairness of his bill.

**1619.** Where the mortgagee or person entitled to a lien petitions for a sale in bankruptcy (*m*), it is necessary (unless there be a special custom of trade to the contrary (*n*)) that he shall have taken a written memorandum as evidence of his equitable security; for if he have neglected to do so he will be obliged to pay all the costs of the petition, including the costs of the trustees' appearance thereon; and the mortgagee has no right to costs, even though it was not his fault, but that of the bankrupt, that no proper mortgage or evidence of security was given (*o*). Such costs must be paid by the mortgagee personally, and not out of the produce of the sale (*p*). On the other hand, if the trustees raise objections on frivolous or mistaken grounds, they will only have costs out of the general estate, or may be made to pay the costs which arise out of their improper opposition (*q*).

**1620.** The memorandum will not carry costs where the

(*i*) *Queen v. Chambers*, 4 Y. & C. 54; *Lewis v. John*, 9 Sim. 366; *Connell v. Hardie*, 3 Y. & C. 582; *Wade v. Ward*, 4 Dr. 602.

(*h*) *Pelly v. Wathen*, 7 Hare, 372; 18 L. J., N. S. Ch. 281.

(*l*) *Detillin v. Gale*, 7 Ves. 583.

(*m*) *Barclay, Exp.*, 5 De G., M. & G. 403; *Horne, Exp.*, 1 Mad. 622; *Trew, Exp.*, 3 id. 372; *Brightwen, Exp.*, 1 Sw. 3; *Buck*, 148; *Robinson, Exp.*, 1 Dea. & Ch. 119; *Sikes, Exp.*, *Buck*, 349; *Twining, Exp.*, 5 Jur. 537.

If there be a memorandum with a verbal extension, or several deposits—some with and some without memoranda—the costs will be apportioned. *Ford, Exp.*, 3 M., D. & De G. 457; *Thorpe, Exp.*, 3 M. & A. 441.

(*n*) *Moss, Exp.*, 3 De G. & Sm. 599; see *Sheppard, Exp.*, 2 M., D. & De G. 431.

(*o*) —, *Exp.*, 2 Mad. 281.

(*p*) *Horne, Exp.*, 1 Mad. 622.

(*q*) *Horne, Exp.*, *supra*; *Bate, Exp.*, 1 Mont. & C. 58.

original security to which it related has been exhausted and the deposit has been extended to a larger sum than that originally specified ; nor where it extends to property not included in the memorandum ; nor where a loan is made upon deposit of agreements for leases, and the leases being afterwards executed are deposited without a new writing ; but the costs will be allowed if part only of the deposited documents be given up, and others substituted for them (*r*).

**1621.** The memorandum need not be contemporaneous with the deposit, nor of a formal nature ; and if it sufficiently show the purpose or terms of the deposit, it is not inoperative by reason that it requires parol explanation (*s*). But a mere receipt by the debtor, written on the creditor's direction to an agent to advance the loan on a deposit of documents, is insufficient (*t*) ; and it is necessary that the memorandum be signed or written by the debtor or his agent (*u*).

**1622.** Where the written memorandum was lost, and not admitted by the assignees, an inquiry was directed as to the fact, nature, and object of the deposit, and whether a memorandum was signed ; and upon a finding that it was lost, costs were given as in the case of a written memorandum ; except that the petitioner was to pay so much of his own costs and of the costs of the assignees of and occasioned by the application, as had been incurred by the loss of the memorandum (*x*).

**1623.** The equitable mortgagee, who is entitled to the costs of an application for sale in bankruptcy, also has the costs where

(*r*) Pigeon, Exp., 2 D. & C. 118 ; 2 L. J., N. S., Bank. 3 ; Robinson, Exp., 1 D. & C. 119 ; Anderson, Exp., 3 De G. & S. 600 ; Cobham, Exp., 3 Dea. 609, differently stated 8 L. J., N. S., Bank. 51.

(*s*) Reynolds, Exp., 2 M. & A. 104 ; 4 Dea. & Ch. 278 ; Reid, Exp., Mont. & M. 114 ; Twining, Exp., 5 Jur. 536 ; Smith, Exp., 1 M., D. & De G. 165 ;

Corlett, Exp., id. 689 ; Vauxhall Bridge Co., Exp., 1 Gl. & J. 101 ; Bisdee, Exp., 1 M., D. & De G. 333. See Gillett, Exp., 3 De G., M. & G. 458.

(*t*) Powell, Exp., 6 Jur. 490.

(*u*) Emmerton, Exp., 3 D. & C. 654 ; Reid, Exp., 1 D. & C. 250.

(*x*) Rodgers, Exp., 3 M., D. & De G. 297.

the same application is for leave to bid (*y*). But where the mortgagee makes a separate application for leave to bid, he must pay the costs of it, unless the petition were presented at the request or by the consent of the trustees (*z*). And if he have caused unnecessary expense the costs will not be allowed merely because the trustees consent (*a*).

**1624.** If the mortgagee become the purchaser of the estate, he must pay the trustees all expenses attending the sale which they might properly have deducted from the purchase-money, though the price was insufficient to cover the mortgage debt (*b*).

**1625.** The incumbrancer by bottomry has, in like manner, a right to the general costs of enforcing his security. But the right to the costs of a reference to ascertain what is due on the bond, will be determined according to the circumstances of each case, but with an inclination to the bondholder; who, however, may be condemned in the whole cost of the reference, if the result of the inquiry show that his demand was exorbitant and extortionate (*c*).

*Of the Costs of Incumbrancers under the Lands Clauses Consolidation Act.*

**1626.** The rights of incumbrancers upon lands, taken by public companies, to costs, when application is made to the court for investment of the purchase-monies, are governed by sect. 80 of the Lands Clauses Consolidation Act (*d*), which provides that in all cases of monies deposited in the bank under the provisions of that or the special act, or an act incorporated therewith, except where such monies shall

(*y*) Berkeley, Exp., 4 D. & C. 572;  
2 M. & A. 54; Jackson, Exp., 2 L. J.,  
Ch. 11.

(*z*) Robinson, Exp., Mont. & M. 261;  
Williams, Exp., 1 D. & C. 489; Mont.  
514; Coort, Exp., 7 Jur. 864; —,  
Exp., 3 De G., M. & G. 339.

(*a*) Danks, Exp., 12 L. J., N. S.  
Bank. 45.

(*b*) Bowles v. Perring, 5 Moore, 290;  
2 Br. & Bing. 457.

(*c*) Eliza, W. Rob. 328; Catherine,  
3 id. 1; Gauntlet, id. 167; Kepler,  
Lush. 201.

(*d*) 8 Vict. c. 18.

have been so deposited by reason of the wilful refusal of any party entitled thereto to receive the same, or to convey or release the lands in respect whereof the same shall be payable, or by reason of the wilful neglect of any party to make out a good title to the land required, the Court of Chancery may order the costs of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the promoters of the undertaking, (that is to say) the cost of the purchase or taking of the lands, or which shall have been incurred in consequence thereof, other than such costs as are therein otherwise provided for, and the costs of the investment of such monies in government or real securities, and of the reinvestment thereof in the purchase of other lands, and also the costs of obtaining the proper orders for any of the purposes aforesaid, and of the orders for the payment of the dividends and interest of the securities upon which such monies shall be invested, and for the payment out of court of the principal of such monies or of the securities whereon the same shall be invested, and of all proceedings relating thereto, except such as are occasioned by litigation between adverse claimants.

**1627.** Incumbrancers upon the interest of a tenant for life or jointress are not entitled to the costs of appearing to consent to the investment (*e*), unless they have been served at the suggestion of the company, or under other special circumstances (*f*); nor to the costs of an application to pay the dividend to the assignees of the tenant for life or of his executors (*g*); nor are incumbrancers upon the corpus of the estate, whose debts are to be paid off out of the funds in court (*h*), or whose incumbrances have been created after the land was taken, and the money paid into court (*i*).

But costs have been given to the incumbrancer paid off, out

(*e*) *Smith, Exp.*, 6 Railw. Cas. 150; N. S. 261.

*Webster, Re*, 2 Sm. & G., App. vi.;  
*Lancashire and Yorkshire Railway Co.*,  
*Re*, 19 L. J., N. S., Ch. 56.

(*f*) *Hungerford, Re*, 1 K. & J. 413.

(*g*) *Byron's Settlement, Re*, 5 Jur.,

(*h*) *Hatfield, Re*, 7 Jur., N. S. 383;  
29 Beav. 370; 32 id. 252.

(*i*) *Middle Drainage, &c. Commissioners, Re, Morg. & Davey, Costs*,  
200.



of the money in court, where the security was a charge created by a will (*h*); and the company pays the cost of the mortgagee, where he appears on an application to invest the purchase-money otherwise than by payment of his mortgage debt (*l*).

The costs of applying the purchase-money in discharge of incumbrances on other parts of the estate, not being specially mentioned in the act, are not allowed against the company (*m*).

The exception in the act, as to costs occasioned by litigation between adverse claimants, applies to the costs of an additional application occasioned by disputes between the owner and his incumbrancers (*n*).

*Of the Mortgagee's Right to Costs and Expenses disbursed.*

**1628.** Besides the costs of the suit, in which the mortgagee's rights are immediately adjusted, as between himself and the owner of the equity of redemption, he has also a right to be repaid all costs and expenses, reasonably and properly incurred in ascertaining or defending his rights, or in recovering the mortgage debt, at law or in equity (*o*). Hence the costs of a foreclosure suit, pending which a suit for redemption is commenced by a *puisé* incumbrancer, will be provided for in the latter suit (*p*), and the mortgagee will be allowed the costs of an ejectment suit (*q*), or of an action

(*h*) *Baroness Braye, Exp.*, 11 W. R. 333.

(*l*) *Nash, Re*, 1 Jur., N. S. 1082; 25 L. J., N. S., Ch. 20; *Peyton, Exp.*, 2 id. 1013; *Egremont v. Thompson*, cit. 28 Beav. 625; *Brooke, Re*, 30 Beav. 233.

(*m*) *Corporation of Sheffield, Exp.*, 21 Beav. 162, L. C. Act; *Hardwicke, Exp.*, 17 L. J., Ch. 422; and *Yeates, Re*, 12 Jur. 279, on similar clauses in private acts. But the costs were given by *Kindersley, V.-C.*, *Leghi, Re*, 2 W. R. 109.

(*n*) *Joliffe, Re*, 3 Jur., N. S. 633.

(*o*) *Godfrey v. Watson*, 3 Atk. 517; *Detillin v. Gale*, 7 Ves. 583; *Ellison v.*

*Wright*, 3 Russ. 458; *Dryden v. Frost*, 3 My. & C. 670. But where he acts as his own solicitor, he will only have costs out of pocket in the matters in which he has so acted. (*Sclater v. Cottam*, 3 Jur., N. S. 630; *Price v. Davies, V.-C. K.* 16 June, 1862.) But this was a case of express trust. So where mortgagee was an auctioneer. (*Thompson v. Rumball*, 3 Jur. 53.)

(*p*) *Ainsworth v. Roe*, 14 Jur. 874.

(*q*) *Lewis v. John*, 9 Sim. 366; *Horlock v. Smith*, 1 Coll. 298; *Sandon v. Hooper*, 12 L. J., N. S., Ch. 309; 6 Beav. 246, where *plaintiff* appears to be printed for *defendant*.

against the mortgagor's surety for the debt (*r*), though the fruits of it be lost by the surety's insolvency; as also the costs of defending the security against an action at law: and the mortgagee will not be held down to the amount at which his costs were taxed at law (*s*). In like manner the costs will be allowed to the mortgagee of taking out administration (*t*) to the mortgagor, or to a person interested under his will, as a necessary party (*u*); or of obtaining a stop order, in pursuance of the mortgage deed, upon a fund in court, the subject of the mortgage, unless the application were unnecessary (*x*). But without the special direction of the court the taxing master will not allow the mortgagee his costs of obtaining the stop order (*y*). The mortgagee's case for the allowance of costs of administration, or other extraordinary expenses incurred before the commencement of the foreclosure suit, ought to appear on the record and in the decree; but the claim will be sufficiently supported by an allegation that other costs, charges and expenses have been properly incurred (*z*).

**1629.** It is essential to the claim of the mortgagee, that his proceedings have been reasonable, for the allowance of the costs is in the discretion of the court (*a*). And none will be given in respect of an unnecessary act (*b*), or of improper or

(*r*) *Ellison v. Wright*, 3 Russ. 458. The right to the costs of an action on the covenant against the mortgagor, except for this authority, was doubted by Kindersley, V.-C.; but the principle stated appears clearly to cover it; and the admission of the doubt would open many well-settled questions as to mortgagees' costs; see *Merriman v. Bonner*, 10 Jur., N. S. 534.

(*s*) *Lomax v. Hide*, 2 Vern. 184; *Ramsden v. Langley*, id. 536.

(*t*) *Ramsden v. Langley*, *supra*.

(*u*) *Hunt v. Fownes*, 9 Ves. 70.

(*x*) *Hoole v. Roberts*, 12 Jur. 108.

(*y*) *Waddilove v. Taylor*, 6 Hare, 307; 17 L. J., N. S., Ch. 408.

(*z*) *Millard v. Magor*, 3 Mad. 433;

*Ward v. Barton*, 11 Sim. 534; 10 L. J., N. S., Ch. 163; Set. 381, ed. 3; *Merriman v. Bonner*, 10 Jur., N. S. 534. Form of inquiry, 1 Set. 396, ed. 3. And if the decree give no direction, an inquiry may be directed on further consideration. (*Thompson v. Rumball*, 3 Jur. 53.)

(*a*) As a general principle, where a person defended an action at law, and afterwards resorted with success to equity, his opponent was not saddled with costs both at law and in equity, but with the costs of one proceeding only. (4 De G., M. & G. 247, per Turner, L. J.)

(*b*) *Macken*, Re, 2 Jo. & Lat. 16.

useless litigation by the mortgagee; as where (*c*) having only a title in equity, he defended an action by the legal owner for the recovery of the estate; or if he sue for rent in an action in the name of a person who has no right to sue (*d*); or where (*e*) he sues a purchaser under the power of sale, for specific performance of the contract, if the suit, being dismissed with costs, appear to have been improper, and was not sanctioned by the mortgagor; though counsel have advised that the purchaser could not rescind the contract; or where (*f*) the mortgagor having refused to redeem because the mortgagee has lost the title deeds, the latter brings ejectment. Nor will the mortgagee have the costs of litigation arising out of the wrongful act of a stranger, although it be directed against the mortgaged estate (*g*).

The mortgagee will have no costs as against the devisees of the equity of redemption, of an action against the mortgagor's executor, upon a bond given by the deceased mortgagor (*h*).

**1630.** Neither will the mortgagee, being a trustee, be allowed the costs of a suit for recovery of the trust funds, where they have been endangered by his own want of care, and the fraud of others; nor will the costs of unnecessary parties to such a suit be thrown upon the fund, to the prejudice of *puisné* incumbrancers: for the trustee, being himself liable to replace the fund, the suit is considered to be for his own benefit (*i*). But a mortgagee of trust money was allowed the general costs of a suit to enforce his security, where the mortgagor had signed a receipt for the whole amount, without having received all of it, and part was lost by the default of the mortgagee's agent; with whom the mortgagor had dealt, knowing that he was intrusted with the fund for the purposes of the transaction (*k*).

(*c*) *Dryden v. Frost*, 3 Myl. & Cr. 670; 2 Jur. 1090.

(*d*) *Burke v. O'Connor*, 4 Ir. Ch. R. 418.

(*e*) *Peers v. Ceeley*, 15 Beav. 209.

(*f*) *Lord Midleton v. Eliot*, 14 Sim. 531.

(*g*) *Doe d. Holt v. Roe*, 6 Bing. 447;

4 Mo. & P. 177; *Owen v. Crouch*, 5 W. R. 545.

(*h*) *Lewis v. John*, 9 Sim. 366; C. P. Coop. 8; 7 L. J., N. S., Ch. 242.

(*i*) *Allen v. Knight*, 5 Hare, 272.

(*k*) *West v. Jones*, 1 Sim., N. S. 205.

**1631.** Where the mortgagee is entitled to costs incurred in respect of his security, and upon bringing an action for them accepts in satisfaction money paid into court, he has no further claim upon the estate in respect thereof, nor in respect of the costs of an action at law beyond the amount at which they have been taxed, though the taxation was between party and party; and if the mortgagee resist redemption upon tender of such costs, and of the principal, interest and other costs due to him, he will be liable to the general costs of a suit for redemption (*l*).

**1632.** A person who has advanced money for the protection of a fund, the subject of a security, without notice of such security, is entitled to costs against the prior mortgagee, who, not being allowed to take the benefit of such advance without indemnifying the lender, has not offered to indemnify him without suit (*m*).

**1633.** The costs of, and incident to, preparing the mortgage, are not mortgagee's costs, the payment of which may be insisted upon in a foreclosure suit, although the mortgagee be one of a firm of solicitors by whom the business was done (*n*). Nor has the solicitor of an intended mortgagee any claim at law against the intended mortgagor for the costs of an unsuccessful negotiation for the security, or for the costs of investigating the title to the property; there being no implied contract on the part of the borrower to produce a security of any particular degree of safety, or any particular title, as in the case of a contract for sale (*o*). But if the Court authorize a mortgage of an infant's estate, and the negotiation goes off without any default on the

(*l*) *Morley v. Bridges*, 2 Col. 621. The judgment obscurely intimates that an order made in chambers by Maule, J., was wrong; and the extra costs occasioned thereby were not thrown upon the mortgagee. But no reason is given.

(*m*) *Myers v. United Guarantie and Life Assurance Co.*, 1 Jur., N. S. 833; 7 De G., M. & G. 112.

(*n*) *Gregg v. Slater*, 2 Jur., N. S. 246; 25 L. J., N. S., Ch. 440; 22 Beav. 314.

(*o*) *Rigley v. Daykin*, 2 Y. & J. 83; *Melbourne v. Cottrell*, 29 L. T., 293; *Wilkinson v. Grant*, 18 C. B. 319; 25 L. J., N. S., C. P. 233. For construction of an agreement on the subject, see *St. Leger v. Robson*, 9 L. J., K. B. 184.

part of the mortgagee, after he has incurred expenses in the examination of the title, the court, on petition, will allow him his costs out of the infant's estate (*p*) (300).

**1634.** If an agreement have been made that the reasonable costs of the intended lender shall be paid, he cannot claim the banker's commission, or other expenses of obtaining the money, incurred before he has accepted the title; nor, it is said, the costs of selling stock, or of realizing other securities for the purposes of the loan (*q*). And an agreement that all costs and charges incurred by the intended mortgagee in investigating the title shall be paid by the intended mortgagor, will not cover the interest of money lying idle during the treaty (*r*).

**1635.** Whilst the equity of redemption remains with the mortgagor he must indemnify the estate against expenses incurred in protecting the title; and even where the equity has passed into the hands of an assignee, between whom and the mortgagee there is no privity of contract, costs so incurred will not be thrown upon the mortgagee, where he has been passive as to the proceedings, though he reap the benefit of the outlay; but it seems it would be otherwise if the mortgagee have been active in or have otherwise adopted the proceedings (*s*).

**1635a.** The estate being after forfeiture considered to be legally the property of the mortgagee, he is entitled to deal with it as owner, and to be indemnified against all costs arising out of his legal and reasonable acts (*t*); and the same principle is extended to equitable mortgagees. If, therefore, the mortgagee assign, after the time for payment has passed, the costs

(*p*) *Craggs v. Grey*, 35 Beav. 166. His costs of preparing the security, including counsel's fees, should be provided for by the order. (*Nicholson v. Jeyes*, 22 L. J., N. S., Ch. 833.)

(*q*) *Blakesley, Re*, 32 Beav. 379.

(*r*) *Sweetland v. Smith*, 1 Cr. & M. 585; 3 Tyr. 491; 2 L. J., N. S., Ex. 190.

(*s*) *Langton v. Langton*, 1 Jur., N. S. 1078; 7 De G., M. & G. 30; 24 L. J., N. S., Ch. 625; and see the judgment in the court below, 18 Jur. 1093.

(*t*) *Wetherell v. Collins*, 3 Mad. 255; *Bartle v. Wilkin*, 8 Sim. 238.

of persons claiming under the assignment, and who are necessary parties to the suit, as trustees or otherwise, will be paid by the mortgagee in the first instance and added to his debt (*u*) ; and, as a general rule, it seems, that the costs of persons who are necessary parties by the mortgagee's act, will be thus disposed of. But where the mortgagee has been disallowed or ordered to pay costs, for improper conduct, the mortgagor has been ordered to pay the costs of the mortgagee's trustee and to be repaid by the mortgagee (*x*).

**1636.** It is not a reason for depriving the mortgagee of his right to charge the costs against the estate, that the person, in respect of whose interest they were incurred, might have been a co-plaintiff in the suit ; because he may have objected to be a plaintiff (*y*). By this, it seems, it is to be understood, that, to deprive the mortgagee of the costs of the party joined as a defendant, it must be shown, not only that he might have been, but that he was willing to be, a plaintiff, and that the mortgagee wilfully abstained from so joining him ; for it has elsewhere been laid down (*z*), that the *cestui que trust*, before filing his bill, should apply to the trustee to be a co-plaintiff ; and that if the *cestui que trust* neglect to do so, and the trustee be not in default, the former shall pay the trustee's costs. And, on the other hand, if the trustee refuse, upon an offer of indemnity, to join as a co-plaintiff, he departs from his duty, and will not be entitled to his costs as defendant. And the infancy of the plaintiff makes no difference. So, it is said (*a*), that *cestuis que trust*, whose titles are identical, and their trustees, should join in answering.

**1637.** But the mortgagee's acts must have been so done as not to burden the estate with unnecessary expense. Therefore

(*u*) *Smith v. Chichester*, 2 Dru. & War. 398 ; *Bartle v. Wilkin*, supra. But the costs of incumbrancers on a charge or life estate will be borne by the charge or life estate ; not by the inheritance or the estate out of which the charge is raisable. (*Stewart v. Marquis Donegal*, 2 J. & L. 662 ; *Ennis*

*v. Brady*, 1 Dr. & Wal. 720.)

(*x*) *Montgomery v. Calland*, 14 Sim. 79 ; *Cockell v. Taylor*, 15 Beav. 127.

(*y*) *Browne v. Lockhart*, 10 Sim. 426.

(*z*) *Reade v. Sparks*, 1 Mol. 8.

(*a*) *Id.* ; *Hornan v. Hague*, 1 Mol. 14, note.

if the mortgagee, or those who represent him, transfer mortgages on distinct estates, by a single deed, so as to cause a necessity for a covenant for production, either by the person redeeming (*b*), or by those interested under the assignment, in case the former should waive his right to delivery (*c*), the costs of preparing and perfecting the covenant and attested copies, and of the redeeming parties' application to the court, will fall upon the mortgagee's estate; but where the mortgagor refused an offer to deliver the deed to him upon his covenanting to produce it, the costs of his application to the court for a reconveyance were thrown upon himself (*d*) (1762).

**1638.** Neither can the mortgagor be saddled with the costs of an assignment by the mortgagee (being the costs of making the assignment, and not such as arise from the joinder of parties to a suit in consequence thereof), where the assignment has been made without the mortgagor's knowledge, and without his being first called upon to pay or procure payment of the mortgage debt (*e*). Nor to the costs of such deeds as are not necessary for the security of the mortgagee: such as a declaration of trust where the mortgagee is a trustee (*f*).

**1639.** The costs of the bankruptcy trustee of a mortgagee who has been in receipt of the rents must be borne by his estate, or by the transferee if the mortgage be transferred (*g*).

And the costs both of the mortgagee himself, and of a trustee, where either of them are necessary parties by the imprudence of the mortgagee, may be thrown upon the latter. Instances of this have occurred where the devisee of land, charged with but insufficient for the full payment of the legacy, mortgaged the land; which being an improper act, and in no way chargeable on the legatee, the costs of the suit to raise the legacy were not allowed out of the price of the estate (*h*). And, in like manner,

(*b*) *Capper v. Terrington*, 1 Coll. 103; 13 L. J., N. S., Ch. 239.

(*c*) *Dobson v. Land*, 4 De G. & S. 575—581.

(*d*) *Capper v. Terrington*, *supra*.

(*e*) *Radcliffe, Re*, 22 Beav. 201.

(*f*) *Martin v. Baxter*, 5 Bing. 160; 2 Mo. & P. 240.

(*g*) *Coles v. Forrest*, 10 Beav. 552; *Horan v. Wooloughan*, Beat. 1.

(*h*) *Shackleton v. Shackleton*, 2 Sim. & St. 242; S. C., Anon., 3 L. J., Ch. 141.

the plaintiff, in a suit to raise the arrears of an annuity, was obliged to pay the costs of his trustee, in whom a term of years had been vested for securing the annuity, but who had never accepted the trust, and refused to do so by answer (*i*).

It has been said (*k*), that where an incumbrancer creates a trust for his own purposes, and in a suit concerning the fund, it becomes necessary to bring him and his trustee before the court, the incumbrancer gets only his own costs and pays those of the trustee; but where the incumbrancer devises or disposes of the charge to several, each, being made a defendant, gets his costs, because all represent but one original incumbrancer. The former part of this proposition seems hardly consistent with the principle stated above as to the rights of the mortgagee.

*Of the Mortgagee's Liability to Costs incurred by the Loss of the Deeds.*

**1640.** The mortgagee, or those who claim under him, also become liable, where he has lost the title deeds of the estate, for any costs which have been incurred in consequence of such loss. If, therefore, upon the mortgagor's refusal to repay the debt, by reason of the non-production of the deeds, and the mortgagee's neglect to give a satisfactory indemnity, a bill of foreclosure be filed (*l*) or an ejectment brought (*m*); or if the mortgagor file a bill for redemption (*n*), upon non-production of the deeds, in which he offers to redeem, and requires a reconveyance; the costs of any of such suits or action will fall upon the mortgagee. And in a suit for redemption, the court will not consider whether the indemnity, if any have been offered, should have satisfied the mortgagor; for he is entitled to institute a suit, in order that any person with whom he may hereafter deal, respecting the estate, may be fully satisfied of the loss. But it is said, that in a foreclosure

(*i*) *Hickson v. Fitzgerald*, 1 Mol. 14, note.

(*k*) *Galway v. Butler*, 1 Mol. 13, note.

(*l*) *Stokoe v. Robson*, 19 Ves. 385.

(*m*) *Lord Midleton v. Eliot*, 15 Sim. 531.

(*n*) *Lord Midleton v. Eliot*, supra.



suit it will be inquired, whether a proper indemnity were offered (*o*).

So, if the mortgagee have a power of sale, but by reason of the loss of the deeds he is obliged to come for a sale under a decree, the subsequent incumbrancers are entitled to be paid their costs of the suit out of the purchase-money, although the amount of it be insufficient to pay the principal and interest due to the plaintiff (*p*).

The mortgagee must also give the indemnity, at his own costs (*q*) (1766).

*Of the Costs arising out of Assignments Pendente Lite.*

1641. If an assignment of the mortgage security be made after judgment, or it seems at all *pendente lite*, the mortgagor will not be charged with the costs of the supplementary proceeding by which the assignee is brought before the court (*r*) (1476). But it has been held, that the costs of an assignment *pendente lite* by the second mortgagee to the first, and by the first to the assignee of her original interest, may be so charged against the estate, though the assignee of that original interest took *pendente lite*.

A purchaser *pendente lite* comes into court *pro bono et malo*, and may become liable for the whole costs of the suit (*s*).

*Of the Costs of Reconveyance.*

1642. The costs of reconveyance are borne by the mortgagor (*t*), as well in ordinary cases, as where the estate has been settled or devised by the mortgagee, or has descended. An exception to this rule is well established (though it has been admitted with reluctance) where the mortgagee is of unsound mind, whether he have been found so by inquisition or not; for

(*o*) And see *Macartney v. Graham*, 2 Russ. & M. 353.

(*p*) *Wontner v. Wright*, 2 Sim. 543.

(*q*) *Lord Middleton v. Eliot*, 15 Sim. 531.

(*r*) *Barry v. Wrey*, 3 Russ. 465; *Coles v. Forrest*, 10 Beav. 552. Where an order was made in a foreclosure

suit to revive against an assignee after decree, it was ordered to be specified that the costs should be paid by the plaintiff. (*James v. Harding*, 24 L. J., Ch. 749.)

(*s*) *Anon.*, 1 Atk. 89.

(*t*) *King v. Smith*, 6 Hare, 475; 1 De G., M. & G. 436.

the conveyance of his interest by the committee, including the costs of the petition, and of the order for conveyance or vesting, is made at the cost of the lunatic's estate, where he is beneficially interested in the mortgage money (*u*). But the exception is not extended to the case of a descent of the mortgaged estate upon a lunatic heir at law (*x*). If the mortgagee be a trustee, the costs of reconveyance will be paid by the persons beneficially interested, if the mortgagor had no notice of the trust (*y*); but by the latter, if it appear, upon the face of the security (*z*), that the mortgagee had no beneficial interest.

The petition for reconveyance seems very generally to have been presented by the mortgagor; but it was laid down by Lord St. Leonards, C., that the proceedings ought to originate with the committee, and that the mortgagor should thenceforth have no right to costs, where he petitioned, unless the committee had declined to do so (*a*). And the later rule is that the mortgagor shall have no costs out of the lunatic's estate, whether he be served with the petition or not (*b*).

**1643.** As to costs of reconveyance or revesting, where the estate has been devised by the mortgagee to trustees (*c*), or has descended to an infant heir (*d*) (unless perhaps he have suffered it to descend, under circumstances which show great disregard of the mortgagor's interest (*e*)), the rule is clear, that the mortgagee's estate is entitled to receive the costs of the proceedings, with the principal and interest.

(*u*) Richards, Exp., 1 Jac. & W. 264; Townsend, Re, 2 Ph. 348; 16 L. J., N. S., Ch. 456; see Marrow, Re, Cr. & Ph. 142; 10 L. J., N. S., Ch. 340; Thomas, Re, 22 L. J., Ch. 858, and 1 W. R. 155; Biddle, Re, 23 L. J., Ch. 22; Hawkins v. Perry, 25 L. J., N. S., Ch. 656; 8 De G., M. & G. 439; 4 W. R. 686.

(*x*) Stuart, Re, 4 De G. & J. 317; Jones, Re, 7 Jur., N. S. 115; 30 L. J., N. S., Ch. 112; 2 De G., F. & J. 554; Rowley, Re, 32 L. J., Ch. 158. But the mortgagor bears the cost of the stamp on the vesting order. (Thomas, Re, 22 L. J., Ch. 858.)

(*y*) Townsend, Re, 1 Mac. & G. 686; Jones, Re, L. R., 2 Ch. Div. 70.

(*z*) Lewes, Re, 1 Mac. & G. 23; 1 H. & T. 123.

(*a*) Wheeler, Re, 1 De G., M. & G. 434; 21 L. J., N. S., Ch. 759.

(*b*) Phillips, Re, L. R., 4 Ch. 629.

(*c*) King v. Smith, 6 Hare, 473; 18 L. J., N. S., Ch. 43.

(*d*) Ommaney, Exp., 10 Sim. 298; 10 L. J., N. S., Ch. 315; King v. Smith; and see Cant, Exp., 10 Ves. 554.

(*e*) See Midland Counties Railway Co. v. Westcomb, 2 Ry. Ca. 211; but this was not a mortgagee's case.

**1644.** The costs of surrendering, or conveying to the equitable mortgagee upon the foreclosure, are not generally provided for by the judgment (*f*), which simply directs the surrender or conveyance to be made (**1708**). In the case of freeholds, when there is no express covenant by the mortgagor to pay the costs of the conveyance, he merely contracts by the deposit to make such assurances as may be necessary to vest his estate in the mortgagee, and he is only bound by the terms of the judgment to execute the conveyance when tendered to him by the mortgagee; but in the case of copyholds, it is the mortgagor's duty to obey the judgment, by surrendering, without any previous tender, or other act by the mortgagee. And the contract on an equitable mortgage, being a contract to transfer the legal estate to the mortgagee, the person whose duty it is to make the transfer must pay the expenses of it (*g*).

**1645.** A mortgagee is not bound to assign the estate after payment, to the mortgagor, or his nominee, if he have notice of an equitable claim by another person on the estate; and if he have agreed to assign upon the false representation that he is bound to do so, the agreement will be treated as a nullity, and the mortgagee will be entitled, as against the mortgagor and his intended assignee, to the costs of their suit to compel the assignment, so far as the costs relate to matters in issue in the suit (*h*).

In like manner, if the mortgagor pay the debt to the mortgagee without respect to an equitable claim, of which he has notice, against the latter, he may become liable to such claim. Where such a claim was made by the mortgagee's solicitor for costs, an order was made for taxation of the costs, and for payment thereof by the mortgagee and the mortgagor, or one of them, within a short day from service of the certificate of taxation. And this was done where the money was paid by

(*f*) In *Hill v. Price*, Set. 206, ed. 2, 404, ed. 3, the mortgagor is directed to pay the expense, but the cost was provided for by covenant. See next case.

(*g*) *Pryce v. Bury*, 2 Drew. 41; 18 Jur. 967.

(*h*) *Banks v. Whittall*, 1 De G. & S. 541.

the mortgagor in pursuance of an agreement for compromising the suit (*i*).

**1646.** A trustee for the mortgagee is bound to assign according to his direction, and if he refuse to do so, in a plain and simple case, as for instance to a purchaser under a power of sale, he will be made to pay the costs of a suit rendered necessary by his refusal (*j*).

**1647.** The solicitor of a mortgagee, who claims a lien on the title deeds in his hands, as against the mortgagee, is entitled (*k*) in a redemption suit to the costs of a petition by the mortgagor, for delivery of the deeds, on payment of the balance due on the mortgage, in discharge of his lien, such costs to be paid by the mortgagor; but not to the costs of investigating a lien claimed by him against other persons. And the mortgagor must be at the expense of the order for delivery of the deeds, where they have come into the custody of the court, in the course of an administration suit of the mortgagee's estate, rendered necessary by the nature of his will; and where they are not deposited in court, by reason of any default or misconduct (*l*). But it will be otherwise if the mortgage be made to executors pending an administration suit, and the mortgagor have no notice either of the character of the executors, or of the suit, and afterwards the executors find it proper to deposit the deeds in court; for then, if the executors refuse to apply for an order for redelivery, the mortgagor may get the order, and will be entitled to the costs of so doing (*m*): which the mortgagees may be ordered to pay without prejudice to any future decision as to the person upon whom they shall ultimately fall.

**1648.** The costs of trustees under the settlement of the equity of redemption, where they are necessary parties to

(*i*) *White v. Pearce*, 7 Hare, 276.

(*j*) *Hampshire v. Bradley*, 2 Coll. 34.

(*k*) *Rider v. Jones*, 2 Y. & C. C. C. 335.

(*l*) *Burden v. Oldaker*, 1 Coll. 105; 13 L. J., N. S., Ch. 240.

(*m*) *Reed v. Freer*, 13 L. J., Ch. 417; 8 Jur. 704.

convey the estate, will be paid out of the mortgage debt (*n*); and so, where the plaintiff is a judgment creditor of the first mortgagee, the costs of such trustees will be paid even before those of the plaintiff, or of the first mortgagee (*o*).

But it seems that the costs of parties made necessary by the act of the mortgagor, are otherwise not generally paid by the mortgagee. Therefore, where the assignees of the bankrupt devisee of an equity of redemption disclaimed, and the bankrupt was joined (1431), he had no costs from the mortgagee (*p*); for it seems, that by the disclaimer, the assignee's interest became revested in the bankrupt. And the mortgagee will not be ordered to pay such costs, even where he has been decreed to pay his own costs of an unsuccessful claim, the determination of which was the object of the suit (*q*). Except, however, the costs of the solicitor to the Suitors' Fee Fund, under Cons. Ord. XL. s. 4, where he is appointed guardian to an infant defendant; because he is an officer of the court, appointed at the request and for the benefit of the mortgagee, who must pay his costs in the first instance (even though the security be deficient), but may add them to his debt (*r*).

### *Of the Right of disclaiming Parties to Costs.*

1649. The right of disclaiming defendants, who represent an insolvent estate, to receive costs, is no better than that of any other defendants who disclaim; and they have no right, arising out of the office which they fill, to receive costs from the mortgagee, even upon the terms that he may add them to his debt; nor upon the ground that no assets have been received out of the estate: because they stand in the place of the insolvent, who can give no more right than he had himself (*s*).

(*n*) *Siffken v. Davis, Kay*, xxi.

(*o*) *Clare v. Wood*, 4 Hare, 81.

(*p*) *Singleton v. Cox*, 4 Hare, 326.

(*q*) *Green v. Briggs*, 6 Hare, 632.

(*r*) *Harris v. Hamlyn*, 3 De G. & S. 470; 18 L. J., N. S., Ch. 403; New-

*bury v. Marten*, 15 Jur. 166; *Spurgeon v. Witham*, M. R., 21 Dec. 1855, on petition for costs not provided for by decree, as well as at the hearing.

(*s*) *Cash v. Belcher*, 1 Hare, 310; 11 L. J., N. S., Ch. 196; *Hunter v.*

It has been intimated (*t*), that the cases of assignees in bankruptcy, and of puisné incumbrancers, are not identical; and it is presumed, that the distinction was founded upon the position of the former as public officers; but the equity arising out of that character has been said (*u*) to be insufficient to lessen the mortgagee's security, by increasing the charge upon the estate. And it is clear that if he take up the litigation as a contending party, instead of disclaiming, he will be left to take his costs out of the bankrupt's estate (*x*). The costs even of the Attorney-General (*y*), claiming ineffectually on behalf of the crown, have been refused, where the costs would have come out of the mortgaged estate.

**1650.** The general rights of disclaiming defendants, upon the subject of costs, fall within the following rules (*z*), viz.—

First. In suits for foreclosure or redemption, where a defendant disclaims in such a manner as to show that he never had, and never claimed, an interest at or after the commencement of the suit, he is entitled to his costs.

Second. If a defendant, having an interest, show that he disclaimed, or offered to disclaim before the institution of the suit, under circumstances which establish actual notice of disclaimer against the plaintiff, or show that with ordinary care and prudence he might have had such notice, he is also entitled to his costs.

Third. Where a defendant having an interest allows himself to be made a party to the suit, and does not disclaim or offer to disclaim till he puts in his formal disclaimer, he is not entitled to his costs (**1654**).

Fourth. A defendant properly made a party, who, after suit commenced disclaims, and, without waiting to be asked, offers to

Pugh, *id.* 307, note; Appleby *v.* Duke, *id.* 303, and 1 Ph. 272; 13 L. J., N. S., Ch. 9; Clark *v.* Wilmot, 1 Ph. 276; 13 L. J., N. S., Ch. 10; Hughes *v.* Kelly, 3 Drn. & War. 495.

(*t*) 1 De G. & S. 544.

(*u*) 1 Hare, 309.

(*x*) Rider *v.* Jones, 2 Y. & C. C. C.

(*y*) Perkins *v.* Bradley, 1 Hare, 219; see Kane *v.* Reynolds, 4 De G., M. & G. 565.

(*z*) Ford *v.* Earl of Chesterfield, 16 Beav. 516; Ridgway *v.* Kynnersley, 2 H. & M. 565; Earl of Cork *v.* Russell, L. R., 13 Eq. 210; Ward *v.* Shakschaft, 1 Dr. & S. 269.

be dismissed without costs, and is yet brought to a hearing, will have his costs subsequent to the disclaimer (*a*). And the offer to disclaim need not contain an offer to pay the costs of the disclaimer (*b*). But if disclaiming, the defendant also pleads and appears to claim his costs, he will have none (*c*).

**1651.** These rules may be illustrated by the following authorities and examples.

It was long since laid down (*d*), that if the defendant disclaim, the court will in general dismiss the bill as against him with costs; by which it is to be understood (*e*), that if the disclaimer show that the defendant never had any interest, or, having had any, that he had parted with it, or disclaimed, or offered to disclaim before the filing of the bill, he will be entitled to costs as having been improperly made a party; but if he were interested at the filing of the bill, and there were no special circumstances, the mere fact of his saying that he finds his interest worth nothing, and therefore repudiates it, does not show that he was improperly joined, and therefore does not give him a right to costs. It is therefore clear, that a simple disclaimer, or abandonment of interest after suit commenced, gives no right to costs, although the disclaimer state that the defendant never claimed, or pretended to have any interest; and though it appear by the pleadings, that the money remaining due is more than the value of the estate; if, when the suit was begun, an interest was then actually vested in the defendant (*f*). But if he show that he never had and never claimed an interest, at or after the commencement of the suit, it will be otherwise; as where a person, named in a will as a devisee

(*a*) *Davis v. Whitmore*, 28 Beav. 617; *Dillon v. Ashwin*, 10 Jur., N. S. 119; *Talbot v. Kemshead*, 4 K. & J. 93.

(*b*) *Lock v. Lomas*, 15 Jur. 162.

(*c*) *Maxwell v. Wightwick*, L. R., 3 Eq. 210; *Bradley v. Borlase*, 7 W. R. 125.

(*d*) *Mittf. Pl.* 319.

(*e*) *Tipping v. Power*, 1 Hare, 405; 11 L. J., N. S., Ch. 257; *Fewster v. Turner*, cited there; *Gabriel v. Stur-*

*gis*, 5 Hare, 97; 15 L. J., N. S., Ch. 201; *Grigg v. Sturgis*, id. 93; *Jones v. Rhind*, 17 W. R. 1091.

(*f*) *Gibson v. Nicoll*, 9 Beav. 403; 15 L. J., N. S., Ch. 195; *Ohrly v. Jenkins*, 1 De G. & S. 543; *Staffurth v. Pott*, 2 De G. & S. 571; *Buchanan v. Greenway*, 11 Beav. 58; contra, *Silcock v. Roynon*, 2 Y. & C. C. C. 376; *Thompson v. Kendall*, 9 L. J., N. S., Ch. 318; *Dalton v. Lambert*; 15 L. J., N. S., Ch. 205.

in trust, showed by his answer (*g*) that he had always refused to act, he was allowed his costs; and that not merely of a short disclaimer, but also of a correspondence set out in his answer, which showed that the circumstances were within the knowledge of the plaintiff, and that a simple disclaimer should have been called for. The same has been held as to a person beneficially interested under a will, who had never claimed any benefit under, or accepted the devise (*h*). So where the defendant disclaimed, and answered that he had assigned whatever interest he ever had in the subject-matter of the suit to another, who admitted the assignment (*i*). But it is otherwise if he does not assign until after the offer to disclaim (*k*), or if disclaiming, he offers to assign on payment of costs (*l*).

**1652.** A defendant who shows that he never had or claimed an interest need not disclaim or offer to do so before he is joined (*m*). If on being joined he takes no step in the suit, but states the facts to the plaintiff's solicitor, and asks if he is required to appear or plead, he will have his costs incurred after that communication (*n*). But a statement, that if he had been applied to, he would have released, or disclaimed his right, but that no such application was made to him, gives no right to costs (*o*); for this shows that the right remains in the defendant: and it is not the duty of the plaintiff to apply to a defendant before filing a bill, to ascertain whether he does or does not claim an interest.

(*g*) *Benbow v. Davies*, 11 Beav. 369; and see *Wilton v. Jones*, 2 Y. & C. C. 344; *Heap v. Jones*, 5 W. R. 106. If properly made a party, the mortgagee will have the costs over against the mortgagor.

(*h*) *Higgins v. Frankis*, 15 Jur. 277; 20 L. J., N. S., Ch. 16. But query as to this case; for the devisee need not accept the devise by any formal act, but the estate is *prima facie* vested in him. If he have not disclaimed, or offered to do so, how does his case differ from that of a necessary defen-

dant, who has not disclaimed before suit?

(*i*) *Glover v. Rogers*, 17 L. J., Ch. 2.

(*k*) *Roberts v. Hughes*, L. R., 6 Eq. 20.

(*l*) *Land v. Wood*, 1 L. J., Ch. 89.

(*m*) *Bellamy v. Brickenden*, 4 K. & J. 670.

(*n*) *Howkins v. Bennet*, 2 H. & M. 567, n.

(*o*) *Collins v. Shirley*, 1 Russ. & M. 638; *Cash v. Belcher*, 1 Hare, 310; 11 L. J., N. S., Ch. 196; *Ford v. White*, 16 Beav. 125.



' Where a defendant put in an imperfect disclaimer, stating only that she did not claim to be interested; it was said that the terms of the disclaimer should have been that she did not and never did claim, and that she disclaimed; for she might be a necessary party as a trustee, and yet might claim no interest according to her own words. And she was refused her costs (*p*). It may seem to be here implied, that if the disclaimer had been more complete, costs would have been given. But it is considered, that this was not meant in a general sense. In the case in question, the amended bill showed that the defendant had no interest.

In a case in which a puisné mortgagee who had been paid, offered first to disclaim at the plaintiff's cost, and afterwards to disclaim unconditionally, it was held that the plaintiff who insisted that he retained an interest which but for the suit could have been got in only at the cost of the person who required it, must pay his costs (*q*).

**1653.** It seems, therefore, that a disclaimer, which would have divested the interest before suit, or an offer to disclaim or to release, which would deprive the plaintiff of any equity to throw upon the defendant the burden of his costs, must have been actually made (*r*). In accordance with which principle is a decision (*s*) by Shadwell, V.-C. E., allowing the costs of a disclaiming assignee, who, having been informed by the plaintiff's solicitors some time before the filing of the bill, that he was a necessary party to a conveyance, directed the draft conveyance to be sent to his solicitor, by whom it was perused and approved, and then returned to the plaintiff's solicitor;—after which no communication took place until service of the *subpœna*: for here the defendant's conduct clearly amounted to an offer to convey.

**1654.** But a distinction has been taken, where (*t*) it was

(*p*) *Vale v. Merideth*, 18 Jur. 992.

(*s*) *Thompson v. Kendall*, 9 Sim.

(*q*) *Day v. Gudgen*, L. R., 2 Ch.

397; 9 L. J., N. S., Ch. 318.

Div. 209.

(*t*) *Gurney v. Jackson*, 1 Sm. & G.

(*r*) *Lock v. Lomas*, 15 Jur. 162.

97; 17 Jur. 204; 22 L. J., N. S., Ch. 417.

made part of the plaintiffs' case, that they had applied to and requested the defendants to pay the mortgage debt, but that the defendants had refused to do so: the averment being followed by an interrogatory founded thereon; whereas the answer stated that no such application was ever made, and that, if it had been made, the defendants would have released and disclaimed.

The decision was not approved of by Romilly, M. R., but seems to have been cited to him from an imperfect report. The judgment of Stuart, V.-C., expressly puts the case upon different grounds from those on which the other cases were decided, viz., upon the untrue averment in the bill (which, however, was admitted to be such as is commonly used in foreclosure bills), and upon the conduct of the parties; and whether or not it be followed, its justice is clear. For, however correct may be the principle so much insisted on by Wigram, V.-C., and followed in all the cases, that, if the defendant were interested at the filing of the bill, he was a necessary party, that principle does not justify the infliction of costs, upon a man to whom no opportunity was ever given of disclaiming or conveying. To such a person the rule which denies costs to a defendant who *allows* himself to be made a party, and does not disclaim, or offer to do so, until answer, is not applicable; for he may be ignorant of the suit until the writ is served upon him. And though the court have not made it the plaintiff's duty to apply to the defendant, yet if the plaintiff aver falsely that he has so applied, the averment may be well taken as an admission of a duty to apply, and the defendant may be put in the same position as if he had been enabled to disclaim before the commencement of the suit.

The assignee of a bankrupt mortgagor, who by his answer disclaimed all interest in the equity of redemption, and alleged a previous offer to do so, but claimed another interest in the suit, was neither allowed to receive, nor ordered to pay, costs (*u*).

**1655.** Although the disclaimer of a defendant may not in form be sufficient to give him costs, yet if it show that, on the

merits, he was not a necessary party, his personal representative is not on his death a proper party; and if joined will have costs (*x*).

**1656.** The defendant was formerly not obliged to adduce evidence that he had no interest (*y*), it being usual to read his answer as evidence on questions of costs. But if a defendant disclaimed generally, and the plaintiff replied to the disclaimer, so that the defendant was obliged to go into evidence to support his statement, the defendant might be allowed both general costs and the costs of the evidence (*z*); though if no evidence were used, the replication alone gave no right to costs. And if the disclaimer were as to part, and the answer as to other part of the subject-matter, the plaintiff was held to be entitled to reply (*a*).

**1657.** It has been held where a defendant assigned his interest before answer, that he ought not to file an answer and disclaimer without communicating with the plaintiff's solicitor; otherwise he would have no costs. On the other hand, the plaintiff ought not, under such circumstances, to strike out the defendant by amendment, before moving to dismiss; and if he occasioned the defendant any costs by so doing, the defendant would be entitled to be indemnified in respect of such costs (*b*) (1781).

*Of adding Costs to the Debt after Judgment.*

**1658.** After a decree had been made in a foreclosure suit, and the accounts taken and report confirmed, the court refused to alter the decree on petition, by directing that there should be no redemption until payment of costs since incurred by the

(*x*) *Ridgway v. Kynnersley*, 2 H. & M. 565.

(*y*) *Glover v. Rogers*, 17 L. J., Ch. 2.

(*z*) *Ford v. Earl of Chesterfield*, 16 Beav. 516; see Mitf. Pl. 319, ed. 4; 880, ed. 5; *Hurst v. Hurst*, 22 L. J., N. S., Ch. 546.

(*a*) *Williams v. Longfellow*, 3 Atk.

582; where, the defendant having disclaimed generally, it was held that on the plaintiff's replication and service of *subpœna* to rejoin she was entitled to have costs for the vexation.

(*b*) *Hawkins v. Gardiner*, 17 Jur. 780; and see *Wright v. Barlow*, 15 Jur. 1149.

plaintiff, in a different suit, in respect of property mortgaged to him, which upon sale proved to be insufficient for payment of the prior incumbrancers (*c*). It seems that the order here sought would have altered not merely the amount payable but also the terms of redemption. But where a mortgagee of copyholds had got into possession by ejectment, pending the foreclosure suit, at the hearing of which the costs of the ejectment, amongst other expenses, were not provided for, the court did, but not without hesitation, make a subsequent order on petition, that those costs and expenses should be added to the principal sum due (*d*).

**1659.** Where a suit for redemption was heard on bill and answer, and upon the defendant's submission to be redeemed the usual account was directed and a day appointed for redemption, taxed costs were given when the bill was dismissed upon the plaintiff's default in payment; the reference being on a subsequent proceeding beyond the bill and answer; and this was done (*e*) even before the general rule, that no more than forty shillings' costs should be given on the dismissal at a hearing on bill and answer, was modified by Lord Hardwicke's Order of 27th April, 1748, which gave the court a discretionary power of decreeing taxed costs upon such a dismissal.

#### *Of Solicitor's Costs.*

**1660.** The Attornies and Solicitors' Act (*f*) provides, that where a person not chargeable within the meaning of the act with a bill shall be liable to pay, or shall have paid the same, the like application may be made for taxation, and the same course pursued on taxation as if the application were made by the party chargeable; provided that in case the application be made when under the provisions of the act a reference is not authorized to be made, except under special circumstances, the court or judge to whom the application shall be made may take

(*c*) *Barron v. Lancefield*, 17 Beav. 208.

(*d*) *Spurgeon v. Witham*, M. R., 21 Dec. 1855. It appeared, however,

that little or no opposition was made to the order.

(*e*) *Newsham v. Gray*, 2 Atk. 286.

(*f*) 6 & 7 Vict. c. 73, s. 38; and see s. 40.

into consideration any additional special circumstances applicable to the person seeking taxation, though such circumstances might not be applicable to the party chargeable with the bill, if he were the party seeking the taxation.

**1661.** The right of the solicitor of the mortgagee to his charges against his client are the same, and his bill will be taxed on the same principle, where the taxation is applied for by the mortgagor under the above enactment, as where the mortgagee himself applies (*g*). The mortgagor has the same right to tax the bill of the mortgagee's solicitor as the mortgagee had ; and if the latter has bound himself as to the solicitor the mortgagor is bound also, and can only tax against the mortgagee (*h*).

**1662.** If a solicitor, being a trustee of mortgaged property, agree with another solicitor, that the latter shall transact trust business upon agency terms, and the costs of such business become payable out of the mortgaged estate, the persons beneficially interested in the equity of redemption, who seek taxation of the agent's bill, are entitled to have it taxed as between principal and agent ; because the co-trustees of him who made the agreement have a right to the benefit of it for their *cestuis que trust* (*i*).

Mortgagee's costs are taxed in the Admiralty upon the same principle as in Chancery (*k*).

The scale of taxation is regulated by the amount of the original debt, and not by the amount due when the litigation commences (*l*).

### *Of Costs upon staying Proceedings.*

**1663.** Upon staying proceedings in a foreclosure suit, upon the offer of a puisné incumbrancer to pay the plaintiff's debt,

(*g*) Jones, Re, 8 Beav. 479.

(*h*) Baker, Re, 32 Beav. 526.

(*i*) Taylor, Re, 18 Jur. 666; 18 Beav. 165. As to the taxation of bills of costs in mortgage cases, see further Lees, Re, 5 Beav. 410; Carew, Re, 8

id. 150; Wells, Re, id. 416. And see as to taxation, Morgan & Davey, Ch. Costs, 331, &c.; Dan. Pr. ed. 4.

(*k*) Kestrel, L. R., 1 Ad. 78.

(*l*) Cotterell v. Stratton, L. R., 17 Eq. 543; 9 Ch. 514.

the costs of the subsequent incumbrancers, parties to the suit, have been ordered to be paid by the plaintiff, who was to have them over from the incumbrancer moving to dismiss (*m*).

A mortgagee who has commenced a foreclosure suit, pending a suit to administer the mortgagor's estate, is entitled, after being satisfied under the latter, to dismiss his own suit, and to have the costs of it (*n*).

(*m*) *Jones v. Tinney*, Kay, xlv.

(*n*) *Brooksbank v. Higginbottom*, 31 Beav. 35.

## CHAPTER XII.

## OF THE JUDGMENT AND OF MATTERS CONSEQUENT ON THE DISCHARGE OF THE SECURITY.

1664. *Of the Nature and Form of the Judgment.*  
 1684. *Of the Time allowed for Payment.*  
 1688. *Of Enlarging the Time for Payment and Opening the Foreclosure.*  
 1707. *Of the Re-conveyance and Delivery of Possession of the Estate and Discharge of the Security.*  
 1724. *Of the Right to Policies of Insurance effected as Collateral Securities.*  
 1732. *Of Judgments for Sale.*  
 1745. *Of Judgments and Orders against Infants and Trustees.*  
 1761. *Of Judgments against Married Women.*  
 1762. *Of the Delivery of the Title Deeds.*  
 1766. *Of the Loss of the Title Deeds.*  
 1771. *Of the Order absolute for Foreclosure.*  
 1779. *Of the Dismissal of the Bill for Redemption.*

1664. THE amount due to the first incumbrancer, whether by mortgage or judgment (*a*), having been fixed, we must in the next place consider, who is the person entitled to the first right of redemption.

And here it is to be noted, that whether the suit be by mortgagor or mortgagee, the price of redemption is the same (*b*). Each party, according as he may be plaintiff or defendant, may be subject to particular equities arising out of those characters, but no distinction is made as to the course and order of redemption, between a suit in which the owner is seeking to clear his estate from incumbrances, and that in which the first (*c*) or a subsequent (*d*) mortgagee is seeking to get pos-

(*a*) For judgment in suit by judgment creditor, see *Bates v. Hillcoat*, Set. 452, ed. 3.

(*b*) *Du Vigier v. Lee*, 2 Hare, 326; *Watts v. Symes*, 1 De G., M. & G.

240.

(*c*) *Barnes v. Fox*, Set. 439, ed. 3.

(*d*) *Jackson v. Brettall*, Set. 477, ed. 3; *Thackwray v. Bell*; *Bell v. Cartwright* (1784).

session of the estate in satisfaction of his debt. And though the mortgagee submit to depart from the common form of the judgment in one particular, as if it direct an account, and then reserve further consideration instead of the usual order for payment or foreclosure; yet he retains his right to have the further order made in the usual form (*e*).

**1665.** Where there are several mortgages in succession, the judgment proceeds upon the principle, that the second mortgagee, as the first assignee of the equity of redemption, fills the place, and acquires the rights of the mortgagor; and he has, therefore, the first right to redeem, upon payment of what is due to the first mortgagee, who, upon such payment, is ordered to convey to the second mortgagee; but, in default of payment, the latter is foreclosed (**1785**) (**1773**). The second mortgagee being thus removed out of the way by foreclosure, an account is taken of the first mortgagee's subsequent interest and costs, and upon payment thereof, with the amount originally found due, the third mortgagee may redeem him, and in default is foreclosed (**1786**) (**1787**) (*f*); and this process is carried on as to all the successive incumbrancers, until the mortgagor or ultimate owner of the equity of redemption alone remains, when he may in like manner redeem, and in default stands foreclosed; and, in the latter case, the estate remains to the first mortgagee, free from all incumbrances. And note, that where there are several incumbrancers, and the mortgagor's suit for redemption is dismissed (which is generally equivalent to foreclosure (**1780**)), the last incumbrancer becomes *quasi* mortgagor, and the others become first and subsequent incumbrancers according to their priorities (*g*).

**1666.** It has been thus far assumed, that none of the successive incumbrancers have exercised their rights of redemp-

(*e*) *Dunstan v. Patterson*, 2 Ph. 341; see observation, 1 De G., M. & G. 242.

(*f*) In *Bingham v. King*, 14 W. R. 414, a puisné mortgagee, who verified the amount of his debt by affidavit, obtained an order for payment without

taking a formal account, out of surplus proceeds of sale paid in by the first mortgagee; creditors, however, being allowed time to dispute the account.

(*g*) 3 Hare, 637.



tion. But the judgment, in the next place, provides for the exercise of these rights, by directing, that in case the second mortgagee shall redeem the first, an account shall be taken of what is due to the person so redeeming on his own security, and for what he shall have paid the first mortgagee, with interest thereon, and costs; and upon payment of the aggregate of these sums, the third mortgagee has liberty to redeem the second, in default of which he is foreclosed according to the process first pointed out (1788); and a further account having been taken of what is due to the second mortgagee in respect of his own debt, and of his payments, the next incumbrancer, or, if there be none, the mortgagor, will be at liberty to redeem (1789).

But if the third mortgagee shall have redeemed the second, an account is taken of what is due to the third, in respect of his security, and of what he has paid; and he may be redeemed by the next incumbrancer, or the ultimate owner of the equity of redemption (1790).

Finally, upon non-payment to the last person to be redeemed of what he shall have paid to the prior incumbrancers, and of his own principal, interest and costs, the owner of the equity himself stands absolutely foreclosed, and the estate as before remains in the hands of such one of the incumbrancers as has cleared off the rest, free from all the debts which affected it (1791).

**1667.** But here it is to be observed, that, although redemption is commonly enforced by foreclosure, that kind of relief is not a necessary consequence of default in payment of the money; for the redemption may be merely permissive. Thus a tenant in tail of incumbered estates, the settlor of which has covenanted to relieve them from incumbrances, and has thus, as between himself and the persons taking under the settlement, thrown the debts upon his unsettled estates, may redeem if he will pay off all the incumbrancers. But if this right of redemption be worked out, in the course of a suit by a person who is subject to the same equities as the settlor, as, for

example (*h*), his bankruptcy trustee, there will be no foreclosure on default, but dismissal only, against the tenant in tail; for the trustee cannot foreclose one whose estate the bankrupt has covenanted to relieve from liability.

Again, it seems that if, for any reason, the judgment to account, instead of being made in the usual manner, proceed upon the undertaking of the mortgagor to pay what shall be found due, the mortgagee, relying upon this undertaking, cannot avail himself of the right to foreclose if default be made in the payment (*i*).

**1668.** The defendant who has the first right to redeem has an interest and a right to see that the judgment is perfected against the first mortgagee; and, consequently, before decrees made on default were absolute in the first instance (**1773**); the puisné incumbrancer might compel the latter to show cause why a decree on default should not be made absolute against him (*j*).

**1669.** Where there are several mortgagees, and the first is also part owner of the equity of redemption, the judgment directs (*k*), that upon payment to the first mortgagee of all that is due to him, by the second, the former shall convey the whole estate, subject to his right to redeem the part in the equity of redemption whereof he is interested; on default of payment, the second mortgagee is foreclosed in the usual manner.

The owner of the residue of the equity of redemption redeems on payment of all that is due, but receives a conveyance only of that part, in which he is interested (*l*).

(*h*) *Chappell v. Rees*, 1 De G., M. & G. 393.

(*i*) *Dunstan v. Patterson*, 2 Ph. 341.

(*j*) *Cottingham v. Earl of Shrewsbury*, 5 Sim. 395.

(*k*) *Sambroke v. Hanbury, Seton*, 209, ed. 2; see *Sober v. Kemp* (**1794**); see the decree in *Lloyd v. Douglas*, 4 Y. & C. 449.

(*l*) But query if he ought not to have a conveyance of all, subject to the right of the first mortgagee to redeem his share of the equity again, upon payment of a proportion, on the principle that the mortgagee must be entirely redeemed, or not at all; or whether, to avoid such a circuitry, the part owner of the equity ought not in the

In case of redemption by the second or other subsequent mortgagee, he is redeemable in his turn by the first mortgagee, being owner of part of the equity, and by the owner of the residue of the equity, on payment by each of a part of the mortgage debt proportioned to his share; and upon redemption, the estate is conveyed to them in the proportions in which they are entitled. If the first mortgagee do not make the payment in respect of his share in the equity, the suit in respect thereof is dismissed. And upon the like default by the other owner of the equity, he is foreclosed.

**1670.** Where a puisné mortgagee of estates, distinct portions of which have been previously mortgaged to several persons, seeks redemption, and to foreclose the mortgagor, he is entitled to a judgment that he may redeem both or either of the estates. If he redeem both, he may foreclose the mortgagor unless he also redeem both; if he redeem but one, the mortgagor must redeem that one or be foreclosed; and as to that which the plaintiff does not redeem his suit will be dismissed (*m*).

**1671.** Where a mortgagee of shares upon which calls had been made since the date of the security, filed his bill to enforce his security, offering to pay the subsequent calls, the company, disputing the security on the ground that the shares were forfeited, were treated as puisné mortgagees disputing the priority of the first incumbrancer, whom they were ordered to redeem; paying his debt and the calls paid, less the sums received by him on account of profits (*n*).

**1672.** If the mortgagor be entitled to a set-off in matters in respect of which he sues for an account, the court may give him the benefit of his set-off, and may either make one judg-

first instance to redeem the mortgagee on payment of a sum proportioned to the redeeming party's share.

(*m*) *Pelly v. Wathen*, 7 Hare, 351—363. App. on another point, 1 De G., M. & G. 16. Where a mortgagee en-

titled to several securities has no right to tack, redemption will be directed according to priority. (*Whitegrave v. Craddock*, Set. 439, ed. 3; *Morgan v. Sandys*, id. 442.)

(*n*) *Watson v. Eales*, 23 Beav. 294.

ment in his suit and in that of the mortgagee, or may give a separate judgment for an account against the mortgagee personally; or, upon payment into court by the mortgagor of the principal and interest, a judgment may be given in both causes, and the foreclosure may be suspended until both accounts have been taken (*o*).

**1673.** Where one person has mortgaged his estate as a surety for another, the judgment is so framed as to give the surety the full benefit of his rights, against the estate of the principal debtor. And the right of redemption being given to both, it is ordered, that if the money be paid by the principal debtor, the estate shall be conveyed to their respective owners; but if by the surety, both estates are conveyed to him, and he of course holds that which belonged to his principal, subject to redemption by him. If neither principal nor surety redeem, the equities of both their estates are foreclosed (*p*).

But as no relief will be given against a surety beyond the express terms of his contract, his mortgage of a reversionary interest will not be subject either to sale or foreclosure if its operation be limited to the application of the proceeds when it falls into possession (*q*).

**1674.** Where there were several mortgages of a wife's freehold and leasehold, by her and her husband to the same mortgagee, to secure several sums (the title deeds of the freeholds being also declared by memorandum to be deposited as a security for the sum secured by the leaseholds), and after a second security on the whole property to another incumbrancer, the husband became insolvent; it being declared that the wife had a separate right to redeem the leaseholds; the decree (*r*), after directing that, in taking the accounts, the

(*o*) *Dodd v. Lydall*, 1 Hare, 333.

(*p*) *Beckett v. Micklethwaite*, 6 Mad. 199; Set. Dec. 417, ed. 8; see *Aldworth v. Robinson* (1797), which also provides for redemption as between the principal and the surety.

(*q*) *Stamford, &c. Banking Co. v. Ball*, 4 De G., F. & J. 310.

(*r*) *Hill v. Edmonds* (1793). Reported also 5 De G. & S. 603; but the observations of Parker, V.-C., must be grievously misreported. The decree

costs should be apportioned between the securities of the prior mortgagee, and that the several amounts due on those securities respectively should be distinguished, and after the usual provision for redemption by the second incumbrancers, and the husband's assignees successively, directed that the wife should be at liberty to redeem the first mortgagees, or be foreclosed, as to, the leaseholds, on payment of the amount due on the leasehold security; that in case the second mortgagees should redeem the first as to both securities, the mortgagor's assignees might redeem them, or be foreclosed, upon which the wife should redeem the second incumbrancers in respect of the leaseholds, or be foreclosed; and that in case the mortgagor's assignees should redeem either the first or the second incumbrancers as to both securities, the mortgagor's wife should redeem the assignees in respect of the leasehold security, or be foreclosed as before (*s*).

**1675.** Where the husband and wife joined in a mortgage of the wife's estate to secure the husband's debt, and the equity of redemption was limited to the wife, her heirs and assigns, it was held, on the bankruptcy of the husband, that the wife (the assignees waiving their prior right) might redeem (**1224**). In the event of dismissal on non-redemption, the life estate of the bankrupt was ordered to be sold, and, after deduction of the proceeds from the debt, proof was to be admitted for the residue; but in case of redemption the proof to stand for the whole amount, subject to any question as to the right to expunge it (*t*). If the mortgage of the wife's estate were executed by her and her husband, part of the

appears to be framed with much care. Compare 16 Jur. 1134.

(*s*) For form of decree where mortgage had a mortgage of property belonging to A. and B. for money advanced to them in different proportions, and another mortgage of the separate property of A., and of his interest in the joint property to secure his separate debt, see *Higgins v. Frankis*, 10 Jur. 328.

(*t*) *Gleaves v. Paine*, 1 De G., J. & S. 87; 9 Jur., N. S. 367; *Paine, Exp.*, id. 701; 3 De G., J. & S. 458. And the estate of the husband or wife, as the case may be, will be indemnified out of the estate of the other of them for whose benefit the money was raised. *Wilkinson v. Beale*, 1 L. J., Ch. 89; *Gray v. Dowman*, 27 L. J., N. S., Ch. 702.

money having been advanced to her before marriage, and the equity of redemption be reserved to husband and wife, the decree for foreclosure will be against them both (*u*) (1761).

**1676.** Where a security has been made subject to a derivative mortgage, the judgment directs (*v*) an account of what is due to the original mortgagee or his assignee, and then of what is due to the derivative mortgagee. And that upon payment to the latter of the sum due to him, not exceeding the sum found due to the original mortgagee, and on payment of the residue if any of what is due to the original mortgagee, both of them shall reconvey. In case of default and foreclosure accordingly, after the computation of the subsequent interest and costs due to the derivative mortgagee, he is ordered to reconvey, on payment of that amount by the original mortgagee, and, in default of payment, the latter is foreclosed.

According to another form (*w*), after taking accounts of what is due to the original and derivative mortgagees respectively, the sum due to the latter is deducted from what is due to the former, and payment is ordered to be made to each of what is due to him; upon the making of which payments, both mortgagees are directed to reconvey as before, and on default, the bill (being a redemption bill) is dismissed. But the latter form seems less complete than the other, inasmuch as it assumes that less is due on the derivative than on the original mortgage.

Where the original securities had been ordered to be set aside, on payment by the mortgagor of principal, interest and costs, the mortgagee and submortgagee may be ordered, upon payment of that amount into court, to reconvey and deliver up the deeds without waiting for the settlement of the accounts and equities between them (*x*).

**1677.** If several of the co-owners of an estate agree to a sale, and the purchaser, believing that the agreement binds

(*u*) *Lewis v. Poole*, 3 Gif. 636.

(*v*) *Dalton v. Wilson*, Set. Dec. 421,  
ed. 3.

(*w*) *Stephenson v. Green*, Set. 473,  
ed. 3.

(*x*) *Lysaght v. Westmacott*, 33 Beav.  
417.

the entirety, pays off a mortgage on the property, the judgment will be against the shares of those only who have not concurred in the sale; and it will provide for partition in case of redemption (*y*).

Where, after a decree in a foreclosure suit, a puisné mortgagee made a derivative mortgage, and the derivative mortgagee filed a new bill against all the parties to the former suit, praying that he might have the benefit of that suit, and might redeem the prior and foreclose the subsequent mortgagees, the bill was dismissed (*z*) as against all but the assignor with costs, and an account was directed of what was due to the derivative mortgagee, for principal, interest and costs of the second suit; upon payment of which by the assignor, (the costs paid by him to the other defendants in the second suit being on a rehearing disallowed,) within six months, the assignee should reconvey; but that in default the assignor should be foreclosed, and the assignee be entitled in right of his security to the benefit of the decree and proceedings in the second suit, and to stand in the place of and use the name of the assignor in the further prosecution of the first suit; and in the meantime should be at liberty to attend the taking of accounts in that suit.

**1678.** In the redemption of an annuity the principle of the common judgment for redemption is applied; though, from the nature of the transaction, a preliminary declaration, setting forth the terms upon which the security is redeemable, is often necessary. After (*a*) the usual account of what is due in respect of the principal and interest of the purchase-money or other sum upon payment of which redemption is decreed, and of the costs of the grantee, and of the monies received by him on account of the annuity, the last-mentioned monies are ordered to be applied, first in reduction of interest, and then of the principal; and reconveyance and the usual subse-

(*y*) *Davies v. Davies*, 6 Jur., N. S. 1320.

(*z*) *Booth v. Creswicke*, 8 Sim. 352; 8 Jur. 323.

(*a*) *Moore v. Rowe*, *Byne v. Vivian*, Set. 480, ed. 3. For judgment in mortgage of pension, see *James v. Ellis*, L. R., W. N. 1870, 269; 19 W. R. 319.

quent proceedings are directed, upon payment of what remains due. In case of overpayment, the grantee is directed to repay the overplus to the grantor.

**1679.** Where the mortgage is of land, and there is also a simple assignment of stock or other personal chattels, or a policy of assurance, the proper order would be for sale of the chattel security in the first instance, and then for foreclosure in respect of the deficiency, lest by taking the estate first, the foreclosure should be opened by the subsequent sale of the policy (**1698**).

But where (*b*) the assignment of the policy was followed by trusts for the application of the monies to become payable by virtue of the policy, although it was doubted whether those trusts excluded the right to sell the policy, yet, inasmuch as, according to the letter of the deed, if the mortgagor had died before the decree, the mortgagee would have been entitled to the full enjoyment of the security, by first applying the policy monies, and then foreclosing for the deficiency, the literal construction was followed, and foreclosure alone was decreed; although it was liable to be opened, if the mortgagee should afterwards resort to the monies to become payable on the policy (which he was allowed to retain for that purpose) to cover the amount for which the estate might be insufficient.

Hence will be seen the importance, where a mortgage of chattels is made as a collateral security to a mortgage of real estate, of not inserting any provisions which may affect the mortgagee's right to an immediate sale of the chattels, and thereby abridge the remedy against the primary security also (*c*).

**1680.** A mortgagee who sues on behalf of himself and the other creditors of a deceased mortgagor (**485**) is entitled to

(*b*) *Dyson v. Morris*, 1 Hare, 413.

(*c*) For forms of judgment on mortgages of stock and chattels see Seton, 402—406, ed. 3; and on a mortgage

by one of the partners in a mine where the other partners have a right of preemption, see *Redmayne v. Forster*, L.R., 2 Eq. 467.



the usual judgment in favour of an equitable mortgagee (*d*), and also to that in favour of a general creditor (*e*). But as he may be satisfied out of the personal estate, as the primary fund for payment of the mortgage debt, and may not need the application of the security, the course is (*f*) not to give relief directly against the security by way of foreclosure, and also against the general estate, but after the account of what is due on the mortgage, to take the usual accounts of the personal estate and of the debts; and if the personal estate should be insufficient to pay the debts, then an account of the other real estate of the deceased, and to ascertain whether there be any and what other incumbrances on the real estate, other than that of the plaintiff: and upon further consideration the court will then be able to give the plaintiff the benefit of his security and of his right against the general estate.

1681. The judgment will be prefaced (in a redemption suit) by a declaration that the right of redemption is still subsisting, or (in a suit for foreclosure or sale) that the security is valid (*g*), where those matters have been in dispute; and it declares, where it is necessary, the rights and priorities, as well of the several incumbrancers, as of any person who has paramount claims on the estate (*h*); and after providing for other incidental matters, the decree directs that the necessary accounts be taken, and, where necessary, that rests be made (1540), and that the amount due from the mortgagee on account of his receipts be applied, first in payment of interest, and then of the principal of the mortgage security (*i*) (1288). It is also directed that the amount due to each mortgagee in respect of his own debt be added to whatever he may have paid for the redemption of preceding incumbrancers, and all sums to

(*d*) *Greenwood v. Firth*, 2 Hare, 241, note; *Skey v. Bennett*, 2 Y. & C. C. C. 405.

(*e*) *Skey v. Bennett*, *supra*.

(*f*) *Hanman v. Riley*, 9 Hare, App. xl.; *Stone v. Van Heythuysen*, 18 Jur. 344; and see a decree *in extenso* in *Marshall v. M'Aravey*, 3 Dru. & War. 236.

(*g*) *Holmes v. Turner*, 7 Hare, 369, note and form; *Faulkner v. Daniel*, 3 Hare, 199, establishing judgment debt; *Carlton v. Farlar*, 8 Beav. 526; and see Set. 455, ed. 3.

(*h*) *Jones v. Griffith*, 2 Coll. 207.

(*i*) See *In Thorneycroft v. Crockett*, 2 H. L. C. 246.

which the court may consider him to be entitled for improvements (1532), or payments made in respect or for the protection (1527) of his security or of the estate (*j*). And upon payment of the sum thus ascertained to be due, by the person whose turn it is to redeem, the mortgagee is ordered to reconvey the estate to or according to the direction of such person, where a conveyance is necessary, and to deliver to him all deeds and other documents relating to the estate.

**1682.** If the money be not duly paid, the defaulter, being a defendant, is generally foreclosed; but if he be the plaintiff in a redemption suit, his action will be dismissed (1779), and thereupon the mortgagee becomes entitled to hold the estate, free from the debts, in payment of which default has been made.

But where a sale has been ordered in lieu of foreclosure, the sale takes place in default of payment at the appointed time, and the produce, being distributed amongst the incumbrancers according to their several rights and priorities, the surplus, if any, is paid over to the person who was the ultimate owner of the equity of redemption.

**1683.** If an estate subject to a mortgage be sold absolutely under an extent, and the money paid into court, the crown will not be allowed upon motion to pay off the mortgagee at once, without his consent, but a reference will be ordered to ascertain what is due on the mortgage (*k*).

### *Of the Time allowed for Payment.*

**1684.** To the person entitled to the first right to redeem, it is the practice to give six months from the date of the certificate, which fixes the amount of the debt; and the equitable, as well as the legal, mortgagee has a right to this time, whether the judgment be for foreclosure or sale (*l*), and

(*j*) For form of foreclosure judgment by consent without account, see *Boydell v. Manby*, 9 Hare, liii.

(*k*) *The King v. Coombes*, 1 Pr. 207.

(*l*) *Parker v. Housefield*, 2 M. & K. 419, *Newton v. Aldous*, *Meux v. Ferne*, *Spring v. Allen*, cited there; *Thorpe v. Gartside*, 2 Y. & C. 730; *Price v.*

although the security be given for a debt, which does not carry interest (*m*). And in a suit by a creditor to enforce his security under a conveyance by the debtor, upon trust to sell in case of non-payment of principal and interest by a given day, with covenants by the creditor not to sell without giving six months' notice, and by the debtor to pay the debt and interest, but with no express proviso for redemption, the debtor's power of preventing the trust for sale from arising, by payment of the debt, amounts to a right of redemption, and entitles him to the common equity against a mortgagee coming to enforce his security (*n*) (1737).

Whether a judgment debtor, when his creditor comes for foreclosure or sale under 1 & 2 Vict. c. 110, s. 13, is entitled to six months to redeem, seems to have been doubted, the point having been left for consideration and the time afterwards given by consent. There seems, however, to be little room for doubt; the judgment creditor is a *quasi* equitable mortgagee (*o*), and having the remedies incident to that character, his debtor should clearly have the corresponding equities.

**1685.** Each of the persons entitled to a subsequent right of redemption has three months from the date of the further certificate; and in the case of a derivative mortgage, this rule applies to the original mortgagee's right to redeem, upon default of redemption by the mortgagor of the original and derivative mortgages (*p*).

**1686.** But where several judgment creditors are entitled to subsequent rights of redemption, one period only of three months is given to them all, it being considered that they ought not to stand exactly in the position of persons who have advanced money on a security; the delay which would arise from giving them successive periods being also a good

Carver, 3 M. & C. 157—163; Lister Jur. 478.

*v. Turner*, 5 Hare, 281, 293; King *v.*

Leach, 2 Hare, 57; Lloyd *v. Whittey*, 17 Jur. 754.

(*m*) Meller *v. Woods*, 1 Keen, 16.

(*n*) Bell *v. Carter*, 17 Beav. 11; 17

(*o*) Boyle, Exp., 17 Jur. 979; 3 De G., M. & G. 530. But see now 27 & 28 Vict. c. 112 (156).

(*p*) Dalton *v. Wilson*, Seton, 421, ed. 3.

reason for this rule (*q*). And it may happen, as where eight subsequent incumbrances were effected upon one day, that only a single right of redemption will be given to the several mortgagees (*r*). The same rule is applied in the case of redemption by the members of a building society, to whom an estate purchased by their trustees has been allotted (*s*); and generally to persons claiming under the same instrument, although, as in the case of tenant for life and remainderman, their periods of enjoyment are different (*t*); but where the equity of redemption in different parts of the mortgaged estate has been vested in several persons as purchasers, or purchasers and mortgagees, by instruments of different dates, they will have successive rights of redemption according to priority of date, as in the case of successive mortgagees of the same property (*u*).

In case more than one of several persons entitled to redeem should be prepared to redeem, at the appointed time, liberty is given to apply to the court without giving notice to the plaintiff and without prejudice to any question as to the rights of the defendants as between themselves (*v*).

The direction for "payment within six months after the date of the certificate," being matter which would have been inserted by the registrar as part of a usual order, may be added by way of correction of the judgment, on motion or petition (*x*).

**1687.** Contrary to the usual legal computation, by which, except in the case of mercantile instruments (*y*), the word "month" means *primâ facie* a lunar month, a calendar month

(*q*) *Radcliff v. Salmon*, 4 De G. & S. 526; *Long v. Storie*, Turner, V.-C., 18 Feb. 1852; *Stead v. Banks*, 5 De G. & S. 560; 16 Jur. 945; *Bates v. Hillcoat*, 16 Beav. 139. For Dec. see Set. 452, ed. 3.

(*r*) *Long v. Storie*, 23 L. J., Ch., N. S. 200.

(*s*) *Peto v. Hammond*, 30 Beav. 495; 8 Jur., N. S. 550.

(*t*) See per Wood, V.-C., *Beavor v. Luck*, L. R., 4 Eq. 537.

(*u*) *Titley v. Davies*, 2 Y. & C. C. C. 899, n.; *Beavor v. Luck*, notwithstanding *Edwards v. Martin*, 4 Jur., N. S. 1044; 28 L. J., Ch. 49.

(*v*) See forms of judgments in *Edwards v. Martin*, 28 L. J., Ch. 49; *Bartlett v. Rees*, L. R., 12 Eq. 395.

(*w*) *Bird v. Heath*, 6 Hare, 236. See Cons. Ord. xxiii. s. 21.

(*y*) *Reg. v. Inhabitants of Chawton*, 1 Q. B. 247.

is implied where the word is used alone, to denote the period allowed for redemption (*z*).

*Of enlarging the Time for Payment, and of opening the Foreclosure.*

**1688.** The mortgagor may be relieved from the strict terms of that part of the judgment in a foreclosure suit which directs payment of the redemption money on a certain day, either by a postponement of that day, or by an actual opening of the foreclosure, after the day has been suffered to pass without payment. The application is made on motion by the person entitled to redeem, or it may be made at the hearing of a special application, by the mortgagee, to make the foreclosure absolute (*a*).

It is only in a foreclosure suit, as a general rule, and not in a suit for redemption, that this indulgence is granted; because, in the latter case, the mortgagor comes to the court for relief, professing that his money is ready, but, in a foreclosure suit, he redeems by compulsion (*b*). So the mortgagor's suit for redemption will be dismissed after the day appointed for payment has passed, though he have subsequently tendered the principal and interest due to the day of the tender (*c*). But, on special circumstances, the time for payment has been enlarged even in a suit for redemption (*d*).

**1689.** Upon good cause shown, the court does not stop at a single enlargement in a foreclosure suit. Relief has been given three, and even four times in succession; and this, although the time fixed by previous orders of enlargement have been thereby expressed to be peremptory, and even though the mortgagor

(*z*) Anon., Barn. Ch. 324; 2 Eq. Ca. Abr. 605. So under 4 Geo. 1, c. 5, in Ireland (*Devereux v. Bradstreet*, Wallis, 338), and under 8 Geo. 1, c. 2, Ireland, s. 4, as to time for redemption to mortgagee of evicted lessee. (*Biddulph v. St. John*, 2 Sch. & Lef. 512.)

(*a*) *Clay v. —*, 9 Sim. 317, n.; *Lee v. Heath*, id. 307, n.; *Alden v. Foster*, 5 Beav. 592.

(*b*) *Novosielski v. Wakefield*, 17 Ves. 417.

(*c*) *Faulkner v. Bolton*, 7 Sim. 319. The report in 4 L. J., N. S., Ch. 81, states that the motion to dismiss the redemption bill was refused on the affidavit of tender after the day; but the report in Simons appears by the Reg. Lib. to be correct.

(*d*) *Tipping v. Hawes*, 10 Aug. 1810, cited 17 Ves. 417.

have undertaken, by signing the Registrar's book, not to ask for any further time (*e*).

But the time is not enlarged, as of course, even upon the first application. Some reason (though a very strong one is not necessary) must be given; as that the defendant has used his best endeavours to find an assignee without success, but that if time be granted there is a reasonable prospect of getting the money (*f*); or that negotiations for that purpose are actually pending. And the magnitude of the sum involved, and of the arrears of interest, are circumstances to which weight will be given; but not, it seems, to the latter, if the arrears have been suffered to increase (*g*).

But something more than this seems necessary upon subsequent applications; such as evidence (*h*) that some steps have been actually taken, as the result of which the money is likely to be forthcoming. And a strong case of unexpected delay or difficulty must be made out to support a third or fourth application.

**1690.** Under the usual circumstances of an application by the mortgagor, by reason of his being unable to raise the money in time, it is necessary to show that the estate is an ample security for the debt (*i*), which fact was formerly stated on the face of the order (*h*). Where, however, a necessity for enlarging the time has arisen from the opening of the account by the act of the mortgagee, the order will be made, although the security appear on the evidence to be of doubtful sufficiency; but care will be taken that nothing is added by the delay to the amount of the debt (*l*).

**1691.** The period granted upon the first application is

(*e*) *Anon.*, Barn. Ch. 221; *Edwards v. Cunliffe*, 1 Mad. 287.

(*f*) *Nanny v. Edwards*, 4 Russ. 124; *Eyre v. Hanson*, 2 Beav. 478; *Quarles v. Knight*, 8 Price, 630.

(*g*) *Holford v. Yate*, 1 Kay & Jo. 677.

(*h*) *Edwards v. Cunliffe*, 1 Mad. 287. See *Campbell v. Moxhay*, where one

reason for refusing an extension was that the application was in violation of an express agreement.

(*i*) *Eyre v. Hanson*, 2 Beav. 478; *Edwards v. Cunliffe*, 1 Mad. 287; *Nanny v. Edwards*, 4 Russ. 124; *Anon.*, Barn. Ch. 221.

(*h*) *Geldard v. Hornby*, 1 Hare, 251.

(*l*) *Ib.*

usually six months, and it does not appear that any longer time has been granted at once. The like period has also been given on a subsequent application, but the usual period has then varied from five to three months according to the circumstances.

**1692.** The order commonly directs, that the time be enlarged upon payment (*m*) by the mortgagor to the mortgagee, on or before the day originally fixed for payment of the principal, interest and costs of the amount certified to be due for interest and costs on the mortgage; but where the large sum of 8,000*l.* was due for interest, the first order was made on payment of 3,000*l.* only on account of interest (*n*). The general condition of payment of interest will not be relaxed by reason of the infancy of the person entitled to redeem (*o*). But if, from the circumstances of the case, or the shortness of the interval between the time of application and of payment under the decree, there is likely to be a difficulty in making the payment in due time, the court will direct enlargement on payment of the interest and costs in a month, or some other convenient time from the date of the order (*p*). And if there be any doubt as to the sufficiency of the security, the condition will also be imposed of immediate payment of the interest to accrue down to the day fixed for the ultimate payment of the mortgage debt (*q*).

If the time fixed for payment be likely to expire before the hearing of objections to the certificate which fixes the time of payment, the court will either enlarge the time on the usual application, or (*r*) if the defendant omit to apply, a new day will be appointed, even after the objections have been overruled.

**1693.** Where the right to redeem is in dispute, and time is required to prosecute an appeal, the object of the court is to make an order, which, without touching the judgment, will yet

(*m*) *Edwards v. Cunliffe*, 1 Mad. 287;  
Seton, 390, ed. 3.

(*n*) *Holford v. Yate*, 1 Kay & Jo.  
677.

(*o*) *Coombe v. Stewart*, 13 Beav. 111.

(*p*) *Eyre v. Hanson*, 2 Beav. 478;  
*Geldard v. Hornby*, 1 Hare, 251.

(*q*) *Geldard v. Hornby*, *supra*.

(*r*) *Renvoize v. Cooper*, 1 Sim. & St.

364.

secure to the person redeeming the recovery of the money which the judgment requires him to pay. In such a case (*s*) the terms imposed will be the payment into court of principal and arrears of interest, consent to a receiver, and payment of interest from the commencement of the suit; or of principal, interest, and costs of suit and of the application. The amount paid in will be ordered to be invested at the risk of the applicant (*t*); and if the dividends or any interest be ordered to be paid to the mortgagee, it will be upon his undertaking to repay the same upon the reversal of the decree.

It appears to have been hinted, that the mortgagee's refusal to produce the title deeds for the mortgagor's inspection (461), although the court would not order such production, would be a good reason for enlarging the time (*u*); but this opinion, if it were really expressed, seems open to great doubt.

**1694.** The order will in all cases proceed to foreclose the mortgagor upon non-payment at the appointed time of the sum, upon the conditional payment of which the order is made (*x*). And if the condition be not complied with the order of foreclosure absolute may be made as of course, and its discharge has been refused (*y*) with costs, though it was sworn to have been obtained by surprise during a treaty between the parties, and notwithstanding an affidavit by the tenant in possession, that he was willing to purchase the estate for more than twice as much as was due on the security. But the order will be discharged if the mortgagee by his own act (as by receiving rent) vary the amount due between the date of the certificate and of the order absolute (*z*).

**1695.** The court will also appoint a new day for payment of

(*s*) *Monkhouse v. Corporation of Bedford*, 17 Ves. 380; *Finch v. Shaw*, 20 Beav. 555; and see *Holford v. Yate*, 1 Kay & Jo. 677.

(*t*) *Finch v. Shaw*, 20 Beav. 555; see *Taylor v. Waters*, 1 Myl. & C. 266; 5 L. J., N. S., Ch. 210.

(*u*) Per Lord King, Mos. 246.

(*x*) *Edwards v. Cunliffe*, 1 Mad. 287; *Eyre v. Hanson*, 2 Beav. 478, and other cases.

(*y*) *Jones v. Roberts*, M'Clel. & Y. 567.

(*z*) *Holford v. Yate*, 1 Kay & Jo. 677; see statement of the case.



the mortgage debt, after default has been made on the day first fixed; and even after inrolment of the judgment, or of the order absolute for foreclosure, and without vacating the inrolment (*a*). And this has been done in favour of the heir of the mortgagor, where the latter was foreclosed on his own consent, given by signing the registrar's book (*b*).

But then the applicant must not only show that he will be able to redeem, if further time be given, but he must also account satisfactorily for non-payment at the proper time.

The expectation that the money will be ready, founded upon a treaty already commenced with a proposed assignee; ignorance of the confirmation of the master's report; misinformation as to the day fixed for payment; irregularity in the proceedings of the suit, prior to the order absolute; the illness, or accidental inability to travel, of the person charged with payment of the money, and poverty, which could be shown to be but temporary, are matters which in the various cases (*c*) have been admitted as reasons for granting further time, after inrolment of the decree for foreclosure. But an irregular act, done under what might have been fairly considered to be a correct view of the law, and not from fraudulent motives, will not be a ground for setting aside the order absolute after inrolment (*d*). Nor, it seems, would the foreclosure be opened by an inadvertent statement in a contract for the sale of the property, that it is made under a power of sale in the mortgage (*e*).

(*a*) *Cocker v. Bevis*, 1 Ch. Ca. 61; *Ismoord v. Claypool*, 9 Sim. 317, n.; *Nanfan v. Perkins*, 9 Sim. 308, n.; *Crompton v. Earl of Effingham*, id. 311, n.; *Jones v. Creswicke*, id. 304; 5 Jur. 763; *Booth v. Creswicke*, 6 id. 1023; *Ford v. Wastell*, 6 Hare, 229; 2 Ph. 591. *Thornhill v. Manning*, 1 Sim. N. S. 451, where it is said to have been Sir J. Wigram's impression, that the enlargement leaves the order absolute untouched (and see *Ismoord v. Claypool*, 9 Sim. 317, n.). But Sir J. Wigram said, that the order should be to vacate the inrolment and *discharge*

the order absolute on condition of payment, and on non-payment the order absolute to stand. See also *Crompton v. Lee*, 9 Sim. 311, n.; *Nanfan v. Perkins*, id. 308, n.

(*b*) *Abney v. Wordsworth*, 9 Sim. 317, n.

(*c*) See the cases cited above, and see *Joachim v. M'Donnell*, 9 Sim. 314, n.; *Ford v. Wastell*, 6 Hare, 229; 2 Ph. 591.

(*d*) *Patch v. Ward*, L. R., 3 Ch. 203.

(*e*) *Watson v. Marston*, 4 De G., M. & G. 230; per *Turner*, L. J.

**1696.** The time of payment may also be postponed, by the death of one of several mortgagees entitled on a joint account where payment was directed to be made to them all (*g*), or by reason of some act done by the mortgagee; as if, being in possession, he receive rents, or other monies on account of the estate, after the sum due has been certified (*h*): because the amount being then varied, the order absolute cannot be obtained, but the account must be carried on, and a new day fixed for payment (**1548**). This may be done on the motion of either of the parties. And if the person entitled to redeem make objection, the mortgagee will not be suffered to verify by affidavit the amount received, and pay it over at once (*i*). But it is not necessary to carry on the account and to fix a new day where the rent has been received after default, though before the affidavit of default was made (*j*). The mortgagee is not on the other hand entitled to any right to postpone redemption, after the day fixed for payment, until payment by the person redeeming, of sums which have been subsequently added to the debt, in respect of another security; because this would be to alter a judgment upon an interlocutory application (*k*).

It seems, also, that it is not the practice (*l*) to put the person redeeming, upon terms of immediate payment of the interest and costs, when the time is thus enlarged by reason of the act of the mortgagee; but the order has been made in that form (*m*), where there was a doubt as to the sufficiency of the security.

**1697.** The foreclosure may also be opened by the act of the mortgagee (*n*), if he sue the mortgagor upon his covenant or bond, where the estate proves insufficient to satisfy the mort-

(*g*) *Blackburn v. Caine*, 22 Beav. 614; *Kingsford v. Poile*, 8 W. R. 110.

(*h*) *Garlick v. Jackson*, 4 Beav. 154; *Alden v. Foster*, 5 Beav. 592; *Ellis v. Griffiths*, 7 Beav. 83; *Prees v. Coke*, L. R., 6 Ch. 645.

(*i*) *Buchanan v. Greenway*, 12 Beav. 355; but see *Oxenham v. Ellis*, 18 Beav. 593.

(*j*) *Constable v. Howick*, 5 Jur., N. S. 331.

(*k*) *Barron v. Lancefield*, 17 Beav. 208.

(*l*) *Buchanan v. Greenway*, 12 Beav. 355, and other cases above.

(*m*) *Geldard v. Hornby*, 1 Hare, 251.

(*n*) *Cook v. Sadler*, 2 Vern. 235.

gage debt. And this, though the decree have been signed and inrolled (*o*).

**1698.** The mortgagee, it will be remembered, has a general right to enforce all his remedies at the same time (**482**). Now, if he proceed first upon his covenant or bond, and obtain part payment of his debt, he may still foreclose for the residue; but, if he proceed by foreclosure first, and then, finding the estate insufficient to satisfy the debt, goes on to sue upon his covenant or bond for the deficiency, equity will only permit him to do this, upon giving a new right of redemption to the mortgagor: for if the mortgagee take his legal remedy first, the mortgagor retains his right to redeem, and the mortgagee ought not, by electing to take the estate first, to be able to get both it and the debt.

And the rights of the mortgagor and mortgagee being correlative, the latter is not entitled to proceed for the deficiency after foreclosure, if by his own act, as by selling the estate to a stranger, the mortgagor be prevented from redeeming (*p*) (**494**).

It seems consistent with the principle that the mortgagee cannot generally sue for the deficiency after foreclosure, if he be not able to restore the estate, that if the estate have been put up for sale, and bought in by the mortgagee, or a trustee for him, the rights of the parties should remain as if there had been no sale. It seems, in fact, to have been the opinion of Lord Thurlow, in such a case, that the mortgagee might proceed at law, and an offer was made to continue the injunction against the judgment, if the plaintiff would bring the money into court. But the bill of the mortgagor was not directly for redemption, but only for delivery of the bond, and for an injunction against the judgment; and it was not said whether or not the condition of redemption should be attached to the right to sue (*q*).

(*o*) *Dashwood v. Blythway*, 1 Eq. Ca. Abr. 317.

(*p*) *Lockhart v. Hardy*, 9 Beav. 349; and see *Tooke v. Hartley*, 2 Bro. C. C. 125; 2 Dick. 785; and *Perry v. Bar-*

*ker*, 8 Ves. 527, and 13 id. 198.

(*q*) *Tooke v. Hartley*, 2 Bro. C. C. 125. The correctness of the report has been disputed, and the confusion of the arguments as stated is such, that there

In a note supposed to have been made by Richards, C.B.(*r*), when at the bar, it is said to have been held in this case, that the mortgagee may sell, and also sue on his bond, there being no reason why a lender should lose part of his debt, and not be able to enforce his additional security. But this strikes at the whole rule, which, permitting the mortgagee to sue first, and then to foreclose, restrains him from suing after foreclosure, without giving a new right to redeem; a rule which is consistent with equity, and a proper check upon speculating mortgagees. Before the foreclosure is complete the lender may use all his remedies at once, and if he foreclose he has a chance of profit. Why then should he complain if the estate turn out of less value than the debt? It has been said(*s*), that until the estate be sold he cannot tell its value, and therefore does not know whether his debt be satisfied or not. But, if a purchaser out of possession can judge of the value of the estate to buy, the mortgagee in possession can surely form as good an estimate.

**1699.** It is considered, however, that the rule does not apply to the case in which a mortgagee has not foreclosed, but has sold the estate under his power of sale; this being one of the remedies expressly given by the security for the recovery of the debt, and the exercise of which, by reason of his liability to account for any surplus, gives him no chance of profit, and ought not to prevent him from recovering any deficiency(*t*).

And even after foreclosure, if the mortgagee be prevented from restoring the estate by an occurrence for which he is not responsible—such as an eviction by a superior landlord where the mortgagee was not liable to pay the rent or to perform the covenants—the general rule does not apply(*u*).

**1700.** The foreclosure will also be opened if the judgment have been obtained by false evidence(*x*), or other fraudulent

cannot be said to be any clear authority on the point.

(*r*) See 2 Bro. C. C. Belt's ed.

(*s*) *Loyd v. Mansell*, 2 P. Wms. 73.

(*t*) The case of *Rudge v. Richens*,

L. R., 8 C. P. 358, though decided on a question of pleading, appears to support this proposition.

(*u*) *Burrell, Re*, L. R., 7 Eq. 399.

(*x*) *Loyd v. Mansell*, *supra*.

or collusive (*y*) practice; as other judgments are set aside under the like circumstances (*z*): but actual fraud and contrivance, and not merely constructive fraud, must be shown for the purpose (*a*).

So an estate was held (*b*) to be redeemable, notwithstanding a release of the equity of redemption, more than twenty years old, and a decree of foreclosure by consent, more than five years old, signed and enrolled; because the release was made upon a secret trust to pay the mortgagor an annuity, the land being also of much greater value than the debt. And after sixteen years a decree has been opened (*c*), under the concurrent circumstances of a great excess in the value of the estate, and the distressed condition of the mortgagor; the last circumstance being probably an indication of oppression on the mortgagee's part; for the court is generally unwilling to open a foreclosure after long acquiescence, especially if buildings or other improvements, or settlements, have been made on the faith of the decree, and where the foreclosure has been by consent; and has refused such relief after six years (*d*).

**1701.** The foreclosure cannot be opened in part; and an action which admits the validity of the judgment as to some of the parties to the suit, and seeks to open it only as to one of them, is therefore demurrable (*e*).

**1702.** The court has refused to open a decree after it had been signed and inrolled, on the mere ground of the overvalue of the estate (though it has been said that a sale at an under-value would be a substantial objection on a suit to set aside the sale) (*f*), or of parol declarations concerning the mortgage, if

(*y*) *Harvey v. Tebbutt*, 1 J. & W. 197.

(*z*) *Gore v. Stacpoole*, 1 Dow, 18.

(*a*) *Patch v. Ward*, L. R., 3 Ch. 203.

(*b*) *Morley v. Elways*, 1 Ch. Ca. 107.

(*c*) *Burgh v. Langton*, 15 Vin. 476.

(*d*) *Tooke v. Bishop of Ely*, 15 Vin.

476, note to pl. 1; *Lant v. Crisp*, id. 469; *Fleetwood v. Jansen*, 2 Atk. 467; and see *Thornhill v. Manning*, 1 Sim., N. S. 451; *Jones v. Kendrick*, 2 Eq. Ca. Abr. 602; 5 Bro. P. C. 244.

(*e*) *Patch v. Ward*, 4 Gif. 96; 9 Jur., N. S. 373.

(*f*) Per Lord Manners, C., *Lightburne v. Swift*, 2 Ba. & Be. 207.

there be no fraud (*g*). And a bill so filed for redemption, on the ground of parol declarations by the mortgagee, both before and after the decree, that he was willing to take his money, the fraud being denied, was dismissed with costs (*h*).

Nor can a mortgagor be relieved against a decree of foreclosure, obtained by consent upon unwritten terms, alleged to have been agreed upon by the solicitors of both parties, and with which the mortgagee afterwards refused to comply, by a suit for performance of the agreement; parol evidence of the terms of the agreement being inadmissible: but it seems, that upon sufficient parol evidence, the foreclosure might have been opened, on the ground that the agreement concerned an order of court, and was made by persons competent to agree upon its terms (*i*).

**1703.** The foreclosure will not be opened, by reason that the mortgage has been mentioned by the mortgagee in his will as a debt (*k*), as mortgage money, or as an interest in property mortgaged to him (*l*); but the property will pass by the will, according to the actual interest of the testator.

**1704.** The circumstance, that a decree for sale erroneously directs payment of the surplus money to the tenant for life, will not be a reason for opening the decree after a lapse of some years, if the sale have been fairly conducted, and there were in fact no surplus (*m*); though the objection would have been substantial, if a surplus had really been paid to the tenant for life; and redemption may be afterwards decreed of an estate which has been sold by the mortgagee, under his power, if due notice were not given according to the deed (*n*).

**1705.** If the mortgagor have not insisted at the hearing of a foreclosure suit, or on the taking of the accounts, upon

(*g*) *Whishall v. Short*, 7 Vin. 397.

(*h*) *Roscarrick v. Barton*, 1 Ch. Ca. 218.

(*i*) *Cox v. Peele*, 2 Bro. C. C. 334.

(*k*) *Tooke v. Bishop of Ely*, 15 Vin. Abr. 476, n., pl. 1; 2 Eq. Ca. Abr. 608,

(*l*) *Silberschildt v. Schiott*, 3 Ves. & B. 45; *Legros v. Cockerell*, 5 Sim. 384.

(*m*) *Lightburne v. Swift*, 2 Ba. & Be. 207.

(*n*) See *Smith v. Fox*, 6 Hare, 386.

his right to redeem, he ought not to be admitted to redeem afterwards, except upon new matter. And if he bring a suit for redemption, after he has acquiesced in a judgment for foreclosure, the time for redemption under that judgment ought not to be enlarged on motion; because (*o*), notwithstanding the foreclosure, the plaintiff will have the benefit at the hearing of any equity which may arise upon his redemption suit.

**1706.** If an incumbrancer who seeks to open the foreclosure and to redeem, on the ground that he was not a party to the suit, be in an obscure station and his means doubtful, he will be ordered to give security for costs in case he do not redeem (*p*).

*Of the Reconveyance and Delivery of Possession of the Estate and the Discharge of the Security.*

**1707.** The mortgagee cannot refuse, when the estate is redeemed, to restore possession of it to the mortgagor, or those claiming under him; having no right, whether the mortgagor's title be good or bad, to dispute it; or to deal with the security in such a manner, that upon discharge of the debt the estate cannot be restored (*q*): nor can the mortgagee claim to retain the estate on the ground that the mortgagor has covenanted with the mortgagee with respect to a separate matter, upon which a judgment, which would be a lien upon the land, might ultimately be obtained; or that another debt might be added to the security in case of a sale, where no sale took place (*r*); and where, after decree to account and pending exceptions to the master's report, the mortgagee committed waste, he was ordered to redeliver possession to the mortgagor; who, however, being a pauper, was ordered to give security to abide the event of the account (*s*). At the present day

(*o*) Fleetwood v. Jansen, 2 Atk. 467.

(*p*) Bird v. Gandy, 7 Vin. Abr. 45, pl. 20; 2 Eq. Ca. Abr. 251, n.; and see Stevens v. Williams, 1 Sim., N. S. 545.

(*q*) Tasker v. Small, 3 Myl. & Cr. 63, 70; Thornton v. Court, 3 De G.,

M. & G. 293; Walker v. Jones, L. R., 1 P. C. 50; 3 Mo. P. C., N. S. 397.

(*r*) Mayor of Brecon v. Seymour, 5 Jur., N. S. 1069; Chilton v. Carrington, 15 C. B. 95.

(*s*) Hanson v. Derby, 1 Vern. 393.

a receiver would probably be appointed under such circumstances.

Where the mortgagee has notice of a prior equitable right in a person claiming under the mortgagor, he may refuse to reassign the legal estate to the mortgagor, or a puisné incumbrancer, without the consent of the owner of the prior right. Therefore (*t*), where a mortgagee B. was paid off by C., but refused to assign to him upon the ground of a prior equitable lien in A.; in suits filed by the contending parties it was decreed that A. might redeem C., and in that case that B. should assign to A. without prejudice; no assignment being necessary by C. or the mortgagor. In case of his not paying C., A. to be foreclosed. In case of payment A. to be redeemed by the mortgagor on payment of what he should have paid C., viz., his own debt and costs, and B.'s costs which he was decreed to pay. The mortgagor to be foreclosed on nonpayment.

And until redemption the mortgagee may hold the estate against everybody who has not a paramount title, and if possession have been got against the mortgagee by fraud, pending the suit, the estate must be restored before redemption (*u*).

**1708.** Where a legal security is the subject of the suit, the decree provides, that, upon payment, the mortgagee shall surrender or reconvey to the person redeeming (whether he be the mortgagor himself, or one claiming under him as a puisné mortgagee or otherwise), free from incumbrances by the mortgagee, or any claiming under him; and shall deliver upon oath all deeds and other documents relating to the estate. But if the person who redeems has only a partial interest in the estate, it must be conveyed subject to the rights of redemption of the other persons interested (*x*). And if and so long as the right of the redeeming party is only under a contract which may not be performed, he is not entitled to require delivery of the deeds or a conveyance, the mortgagee being in the meantime entitled

(*t*) *Banks v. Whittall*, 1 De G. & S. 541.

(*u*) *Lant v. Crispe*, 2 Eq. Ca. Abr. 599; 15 Vin. Abr. "Mortgage," 469,

pl. 13; and see *Tyson v. Cox*, T. & R. 395.

(*x*) *Pearce v. Morris*, L. R., 5 Ch. 227; *Elisha v. Elisha*, Seton, ed. 3, 475.



to withhold them until the title is complete (*y*). If the mortgagee be in possession, it is also proper to add (*z*), that he shall deliver possession of the mortgaged estate; for the person redeeming is not to be put to his ejectment after payment to recover the possession.

The decree then provides, that, in default of payment, the person to whom the right of redemption was given, do stand foreclosed; but this should not be followed by any order to give possession, because the legal estate is already in the mortgagee, and he is left to his ejectment (*a*), if he cannot otherwise get into possession.

**1709.** Where the security is equitable, the mortgagee upon redemption is ordered to deliver up all deeds, &c. in his custody relating to the estate, to the person redeeming, but in case of nonpayment, the party making default is ordered to convey or surrender to the mortgagee, free from incumbrances (*b*) (**1644**); or if a sale be directed, the produce is ordered to be paid to the credit of the cause, to be applied as the decree directs.

Where the estate had been sold by the mortgagee under his power of sale in the mortgagor's lifetime, the surplus money paid into court was paid out to the administrator of the mortgagor, though the heir-at-law, disputing the validity of the mortgage, had commenced an ejectment against the purchaser (*c*) (**813**).

**1710.** The reconveyance is directed in terms applicable to the interest of the person to whom it is to be made. Where a single right of redemption is given to several, one of whom may redeem separately; as to successive tenants for life (*d*), to tenant for life, or his assignee, and tenant in tail, joint

(*y*) *Pearce v. Morris*, *supra*.

(*z*) *Yates v. Hambly*, 2 Atk. 363; *Arthur v. Higgs*, *Evans v. Kinsey*, Set. 468, ed. 3.

(*a*) *Sutton v. Stone*, 2 Atk. 101; *Wood v. Hodges*, 2 Fowl. Exch. Pract. 342.

(*b*) *Holmes v. Turner*, 7 Hare, 370, n.; *Footner v. Sturgis*, 5 De G. & S. 737; *Pryce v. Bury*, 17 Jur. 1173.

(*c*) *Mary Smith's Mortgage*, Re; 9 W. R. 799.

(*d*) *Aynsley v. Reed*, Set. 166; 294, ed. 3.

tenants (*e*), or tenants in common, the decree directs a conveyance to be made to them, or to such of them as shall redeem; or, as to the latter, the conveyances may be ordered to be made to them of their specified proportions of the equity of redemption (*f*).

Where the right is given to representatives, or to husband and wife, the order is merely to convey to them or as they shall appoint.

Settled estates are directed to be conveyed upon the trusts of the will or settlement, under which the limitations have been created (*g*). Where a single right is given to a person claiming under a settlement, and to another party, to redeem settled and unsettled estates, the former being entitled to redeem all, but the latter those which are unsettled only, the unsettled estates are directed to be conveyed to the redeeming parties, or to him who shall redeem, and the settled estates upon the trusts of the settlement (*h*) (1796). And in case of infancy, the reconveyance is ordered to be made to such person as shall for that purpose be named in the chief clerk's certificate (*i*).

**1711.** A reconveyance upon payment of the debt, where the time has been enlarged after enrolment of the order absolute for foreclosure, will be made subject to any contract which the mortgagee has entered into concerning the estate after the enrolment; upon the faith and from the date of which he has full power to deal with the estate as his own (*k*).

**1712.** And upon foreclosure, if there be a paramount claim (such as dower), unaffected by the decree, the right of the claimant will be declared, or the foreclosure will be expressly made subject to it (*l*). And incumbrancers taking the estate,

(*e*) *Sober v. Kemp*, 6 Hare, 162, n.

(*f*) *Sambrooke v. Hanbury*, Set. 427, ed. 3; *Thornycroft v. Crockett*, 2 H. of L. C. 247.

(*g*) *Aynsley v. Reed*, Set. Dec. supra; *Colyer v. Colyer*, 9 L. T., N. S. 214.

(*h*) *Chappell v. Rees*, 1 De G., M. & G. 393.

(*i*) *Seton*, ed. 3, p. 689.

(*k*) *Thornhill v. Manning*, 1 Siml. N. S. 451.

(*l*) *Jones v. Griffith*, 2 Coll. 208; Set. 424, ed. 3.

or money which represents it (*m*), will be ordered to discharge any liabilities, past or future, to which the estate may be subject, or to make any payments which other incumbrancers ought to have received out of the estate. So tenants by the curtesy (*n*), and other tenants for life, will be ordered, upon taking the estate, to pay the past and future interest upon the mortgage (1558).

**1713.** If the person in whom the estate will vest by virtue of the foreclosure be a trustee, the decree declares, that in case of foreclosure such person is to be considered as a trustee of the mortgaged premises for the benefit of the *cestuis que trust*, according to their respective proportions of the mortgage debt (*o*). And so on redemption by a person entitled to a partial interest under the settlement, the mortgagee may require the insertion of an express declaration in the reconveyance, that it is made subject to the trusts of the settlement (*p*).

**1714.** The mortgagee is not obliged to assign the mortgage debt to the mortgagor upon redemption; or to a purchaser, when the security is paid off out of the proceeds of a sale under a decree (*q*); or to convey to any other person as a mortgagee in his own place; being bound only to reconvey the estate to the owner of the equity of redemption (*r*). And he may refuse to execute a reconveyance containing incorrect recitals; but not a reconveyance without recitals which is approved by all the parties interested in the equity of redemption (*s*).

But where a purchaser from the mortgageor buys free from incumbrances, and, desiring to take an assignment of the security, procures the mortgagee to release the mortgagor from all liability in respect of the mortgage debt, and protects him against any additional expense arising from the form of the conveyance,

(*m*) See *Barnes v. Racster*, 1615.

(*n*) *Dale v. Taylor*, Set. 231, ed. 2; 475, ed. 3.

(*o*) Set. 424, ed. 3.

(*p*) *Wicks v. Scrivens*, 1 J. & H. 215.

(*q*) *James v. Biou*, 3 Sw. 234; *Colyer v. Colyer*, 9 L. T., N. S. 214.

(*r*) *Dunstan v. Patterson*, 2 Ph. 341; *Anon.*, 2 Mol. 505.

(*s*) *Hartley v. Burton*, L. R., 3 Ch. App. 365.

the mortgagor cannot refuse to convey the equity of redemption in such a manner as to keep the security on foot (*t*).

**1715.** On the discharge of a mortgage, under ordinary circumstances, the estate is reconveyed to the owner of the equity of redemption, or the mortgage term is surrendered by a concise deed of conveyance or surrender, purporting to be made in consideration of the payment of all monies due in respect of the security; with a covenant by the reconveying party that he has done no act to incumber (*u*). The same course is usually adopted on the discharge of an equitable mortgage created by deed; although by the mere receipt for the mortgage debt the mortgagee's interest in the estate becomes revested (*x*).

Since the 7th August, 1874, the legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee shall have been admitted, may, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate, whether the mortgage be in form an assurance subject to redemption, or an assurance upon trust (*y*).

The object of this enactment appears to have been merely to substitute the person entitled to receive the money as a conveying party for the devisee or heir; but for want of care in the framing it will probably cause more difficulty than it cures. The language being permissive only and not imperative, and the estate not being (as in the case of the estate of a bare trustee in the next section of the act) directed to vest in the legal personal representative, it seems that the estate still vests in the heir or devisee, and that there may be two persons able at the same moment to make a title to the legal estate; and it does

(*t*) *Cooper v. Cartwright*, Joh. 679.

(*u*) If Pepys may be trusted, it was uncertain in his time whether either by law or practice the representative of the mortgagee in reconveying was bound to warrant against the acts of his testator, or only against his own. The opinions given by counsel being different, "enough to make a man forswear ever having to do with law," they agreed to refer it to Serjeant May-

nard. (Diary, 29 June, 1663.)

(*x*) As to the circumstances under which it will be presumed that the legal estate in mortgaged property has been reconveyed, or a mortgage term surrendered before the passing of the Satisfied Terms Act, see Sugd. V. & P. ed. 11, pp. 527, 528; Dav. Conv. Pre. vol. 2, 618, n., ed. 2.

(*y*) Vendor and Purchaser Act, 1874, 37 & 38 Vict. c. 78, s. 4.

not appear whether the personal representative can convey at all under the act if he exercise the power of sale.

It is presumed that this provision will not affect the rights of the lord of the manor, where the mortgagee has been admitted to copyhold; and it seems doubtful whether it will apply if the heir have been admitted (*z*).

**1716.** In the case of a mortgage of copyholds, if after the admittance of the surrenderee, the surrenderor perform the condition, he may re-enter and shall have the land without any new admittance, or any new fine; for he is in of his old estate. But if the day of payment of the money by the surrenderor be past, so that he has only an equity of redemption, he must pay a fine and be readmitted (*a*).

Whether the money be paid or not at the proper time, if the surrenderee have not been admitted, it is considered sufficient in practice to enter satisfaction on the rolls (*b*) (19).

**1717.** In the case of mortgages whereof memorials shall be entered in the registry offices under the Middlesex and Irish Registry Acts (*c*), if at any time afterwards a certificate shall be produced to the registrar signed by the mortgagee or mortgagees, his, her or their executors, administrators or assigns, and attested by two witnesses, whereby it shall appear that all monies due have been paid or satisfied, and which witnesses shall prove upon oath the payment or satisfaction and signing of the certificate, an entry shall be made in the margin of the registry book against the registry of the memorial of the mortgage, that the mortgage was satisfied and discharged according to the

(*z*) See also the observations upon this clause in Dart and Barber's work on Vendors and Purchasers, ed. 5, p. 16.

(*a*) Gilb. Ten. 276; see Simonds v. Lawnds, Cro. Eliz. 239.

(*b*) 1 Scriv. 194, ed. 4; 129, ed. 5; 2 Dav. Conv. 587, ed. 2; 667, ed. 3.

(*c*) 7 Ann. c. 20, s. 16; 8 Ann. c. 10, s. 3. In the other Registry Acts, viz., West Riding, 5 Ann. c. 18, s. 10; East Riding and Kingston-upon-Hull, 6 Ann.

c. 35, s. 27; North Riding, 8 Geo. 2, c. 6, s. 32; the regulation is extended to registered judgments, statutes and recognizances: and in all except the North Riding Act, which follows the Middlesex and Irish Acts, the certificate of payment or satisfaction is to be signed both by mortgagor and mortgagee. Under the Irish Act, the certificate must be sealed, and the signing and sealing need be proved by only one of the witnesses to the certificate.

certificate to which the same entry shall refer; and the certificate shall be filed to remain upon record in the registry office.

**1718.** Under the Land Transfer Act, 1875, the registrar shall, on the requisition of the registered proprietor of any charge, or on due proof of the satisfaction thereof, notify on the register, in the prescribed manner, by cancelling the original entry or otherwise, the cessation of the charge; and thereupon the charge shall be deemed to have ceased (*d*).

**1719.** Where, upon the first registration of any freehold or leasehold land, notice of an incumbrance affecting it has been entered on the register, the registrar shall, on proof to his satisfaction of the discharge of such incumbrance, notify in the prescribed manner on the register, by cancelling the original entry or otherwise, the cessation of such incumbrance (*e*).

**1720.** The statute 6 & 7 Will: 4, c. 32, s. 5, concerning Building societies, makes a receipt for monies advanced by the society, indorsed upon any mortgage or further charge by the trustees of the society for the time being, sufficient to vacate the mortgage or further charge, and to revest the estate in the person entitled to the equity of redemption, without the necessity for any reconveyance; the form of the receipt being specified in a schedule, directed to be annexed to the rules of the society (*f*).

It has been doubted whether the meaning of this provision is, that on the discharge of the security by the mortgagor, the receipt revests the legal estate in him as the owner of the equity of redemption; or that on the discharge by him, or by any other person, it becomes revested in whichever of the persons interested has the best right to call for it: but it was held that, in either case, upon the discharge of the first mortgage by a person who discharged it with the intention

(*d*) 38 & 39 Vict. c. 87, s. 28; Rule 22, Dec. 1875.

(*e*) Id. s. 19; Rule 27, Dec. 1875.

(*f*) For forms of decrees for redemption by members of building societies, see Seton, 481, 482, ed. 3.

of standing in the place of the mortgagee, and who obtained possession of the deeds, the legal estate vested in him as the person who had the best right to call for it (*g*).

**1721.** By the Friendly Societies Act, 1875, a receipt under the hands of the trustees, countersigned by the secretary, in the form in the third schedule to the act, or in any other form specified in the society's rules, for all monies secured to the society by any mortgage or other assurance,—such receipt being endorsed upon or annexed to the mortgage or assurance,—vacates the same, and vests the property in the person entitled to the equity of redemption, without reconveyance or resurrender (*h*).

If the mortgage or assurance have been registered under any act for the registration or record of deeds or titles, or is of copyhold or customary land, and entered on any court rolls, the registrar under such act, or steward of the manor, or keeper of the register, shall, on production of such receipt verified by oath of any person, enter satisfaction on the register or on the court rolls respectively, of such mortgage, or of the charge made by such assurance; and shall grant a certificate either upon such mortgage or assurance, or separately to the like effect, which certificate shall be received in evidence in all courts and proceedings without further proof (*i*).

**1722.** In like manner, the Merchant Shipping Act, 1854 (*k*), declares, that where any registered mortgage has been discharged, the registrar shall, on the production of the mortgage deed, with a receipt for the mortgage money indorsed thereon,

(*g*) *Pease v. Jackson*, L. R., 3 Ch. 576, notwithstanding *Prosser v. Rice*, 28 Beav. 68. The costs of a deed of reconveyance have been allowed (*Page, Re*, No. 2, 32 Beav. 485), although the statutory receipt would have been sufficient; but the decision was only on the ground that the taxing master was not competent to inquire whether the deed was proper or not.

If the trustees have been admitted

to copyholds, it seems that a resurrender will still be necessary. (*Barry on Building Societies*, p. 115.)

(*h*) 38 & 39 Vict. c. 60, s. 16 (7), not applying to Scotland or Jersey.

(*i*) *Id.* (8). A fee of two shillings and sixpence is payable for the entry and certificate; by means of stamps in Ireland.

(*k*) 17 & 18 Vict. c. 104, s. 68.

duly signed and attested, make an entry in the register book to the effect that such mortgage has been discharged; and upon such entry being made, the estate, if any, which passed to the mortgagee, shall vest in the same person or persons in whom the same would, *having regard to intervening acts and circumstances*, if any, have vested, if no such mortgage had ever been made.

And so upon the indorsement on a certificate of mortgage, of the discharge of a mortgage made under such certificate, the mortgagee's estate becomes vested in the person or persons in whom it would, having regard to intervening acts and circumstances (if any), have vested, if no such mortgage had been made (*l*).

If therefore the first of two mortgages be paid off, and a receipt be given for the money, and duly registered under the Shipping Act, it seems clear that the first mortgagee's interest would vest, by virtue of the receipt, in the second mortgagee, as the person in whom it would have vested by an intervening act, (*viz.* the second mortgage,) if the first mortgage had not been made. And the entry when made is conclusive as to the discharge of the mortgage, which cannot be revived by an entry on the register that the former entry was erroneous (*m*).

But where registration of the bill of sale of a ship on a sale by a mortgagee under his power had been refused by reason of an entry of the discharge of the mortgage, which was proved to have been made under a mistake, the court made a declaration that the purchaser was entitled to be registered as owner of the ship (*n*).

**1723.** Whenever a quietus shall be obtained by a debtor or accountant to the crown (**153**), and an office copy thereof shall be left with the senior master of the Court of Common Pleas, together with a certificate signed by the accountant-general that the same may be registered, the said master shall forthwith enter the same in the said book of debtors and accountants

(*l*) Sect. 80 (7).

(*m*) *Bell v. Blyth*, L. R., 6 Eq. 201; 4 Ch. 136.

(*n*) *Rose*, L. R., 4 A. & E. 6; see 3 & 4 Vict. c. 65, s. 4; and Admiralty Court Act, 1861, c. 10, s. 11.



to the crown in alphabetical order by the name of the person whose estate is intended to be discharged by such quietus, with the date; and shall for any such entry be entitled to a fee of 2*s.* 6*d.* (*o*).

The Commissioners of the Treasury for the time being, or any three of them, may also by writing under their hands, upon payment of such sums of money as they may think fit to require into the exchequer to be applied in liquidation of the debt, or liability of any debtor or accountant to the crown, or upon such other terms as they may think proper, certify that any lands, tenements or hereditaments of any such crown debtor or accountant shall be held by the purchaser or mortgagee, or intended purchaser or mortgagee thereof, his or their heirs, executors, administrators and assigns, wholly exonerated and discharged from all further claims of the crown in respect of any debt, claim or liability present or future of the debtor or accountant to whom such lands, tenements or hereditaments belonged, or in cases of leases for fines to certify that the lessees, their heirs, executors, administrators and assigns, shall hold so exonerated and discharged without prejudice to the rights and remedies of the crown against the reversion of the lands, tenements or hereditaments comprised in any such leases, and the rents and covenants reserved and contained by and in the same; and thereupon the same lands, tenements or hereditaments shall respectively be held accordingly, wholly exonerated and discharged as aforesaid, but in cases of leases without prejudice as aforesaid (*p*).

Provided that any such certificate, or the discharge of any such lands, tenements or other hereditaments, by virtue of the act, shall in nowise impeach, lessen or affect the right of the crown to levy the whole of any debt or demand which may at any time be due from any such debtor or accountant to the crown out of or from any other lands, tenements or hereditaments which would have been liable thereto in case no such certificate had been granted and no such discharge had been obtained (*q*).

(*o*) 2 & 3 Vict. c. 11, s. 9.  
(*p*) Sect. 10.

(*q*) Sect. 11.

Upon the satisfaction of a judgment, the senior master of the Common Pleas is empowered by statute, upon the filing with him of an acknowledgment, in the form appended to the act, to enter a satisfaction or discharge as to any registered judgment, pending suit, lis pendens, decree, order, rule, annuity, or rent-charge or writ of execution, charging the fees for registry and certificates mentioned in the act (*r*).

And by another act, reciting that a registered lis pendens cannot be vacated without the consent of the person by whom it was registered, and such consent is sometimes withheld although the suit or proceeding is at an end, or is not being bonâ fide prosecuted, it is enacted that the court before which the property sought to be bound is in litigation may, upon the determination or during the pendency of the lis pendens, where the court shall be satisfied that the litigation is not prosecuted bonâ fide, make an order, if it shall see fit, for the vacating of the registration without the consent of the party who registered it; and may, in the discretion of the court, direct the party on whose behalf the registration was made to pay all the costs and expenses occasioned by the registration or the vacating thereof.

The application to the court pending the litigation may be in a summary way, by petition or motion in court, or by summons at chambers; and if an order shall be made for vacating any such registration, the senior master of the Common Pleas at Westminster shall, upon the filing with him of an office copy of such order, enter a discharge of such lis pendens on the register (*s*).

The vacating of judgments and of bonds and recognizances to the crown, and lis pendens in Ireland, is provided for by 11 & 12 Vict. c. 120, ss. 10, 11, 12; 13 & 14 Vict. c. 29, s. 9; and 34 & 35 Vict. c. 72, ss. 20, 21, and Sched. A.

*Of the Right to Policies of Insurance effected as Collateral Securities.*

**1724.** If the grantee of an annuity, by way of security, or other mortgagee, choose to insure the life of his grantor,

(*r*) 23 & 24 Vict. c. 115, s. 2.

(*s*) 30 & 31 Vict. c. 47, s. 2.

or an ordinary creditor the life of his debtor, paying the premiums out of his own pocket, the policy belongs to the grantee or creditor, the insurance being a contract between other persons, and with which the debtor has no concern. He cannot call upon the creditor to keep the policy in force, and the receipt of the insurance money by the latter is not a discharge of the debt (*t*). And the mere fact that the creditor has charged the debtor with the premiums in his accounts, if there be no evidence that the debtor was aware of the fact, or that he had agreed to pay them, will not give him a right to the policy (*u*).

But if, upon the insurance by the creditor it be agreed, or can be inferred, that the debtor shall be charged with the premiums, and that the policy is effected as a security or indemnity, the policy or the balance of the insurance money, after discharge of the debt, will be the debtor's, and it will be immaterial in such a case that the premiums were not actually paid by the debtor, if he have been charged with them in account by the creditor, and have not disputed his liability to pay them (*x*); and as the mere non-payment by the mortgagor of a charge attributable to the mortgaged property, cannot have the effect of foreclosure, the payment by the mortgagee of the premiums, on the mortgagor's refusal, will not divest the right of the latter to the policy, after payment by him of the advances with interest (*y*).

The circumstance that an allowance for insurance was included in the calculation of the consideration will not, how-

(*t*) *Gotlieb v. Cranch*, 17 Jur. 704; 4 De G., M. & G. 440; *Williams v. Atkyns*, 2 Jo. & Lat. 603; *Humphrey v. Arabin*, Ll. & G., t. Plunkett, 318; *Lancaster, Exp.*, 4 De G. & S. 524; *Bashford v. Cann*, 33 Beav. 109; *Knox v. Turner*, L. R., 9 Eq. 155, in which, however, it was held on appeal (5 Ch. 515), that the case was merely one of the sale of a redeemable annuity, and not of debtor and creditor.

(*u*) *Bruce v. Garden*, L. R., 5 Ch. 32.

(*x*) *Holland v. Smith*, 6 Esp. 11;

*Lancaster, Exp.*, supra; *Morland v. Isaac*, 20 Beav. 389; *Brown v. Freeman*, 4 De G. & S. 444; *Henson v. Blackwell*, 4 Hare, 434; *Storie's Trusts*, Re, 1 Gif. 94; 5 Jur., N. S. 1153; *Courtenay v. Wright*, 6 Jur., N. S. 1283; 2 Gif. 337; *Lea v. Hinton*, 19 Beav. 324; 5 De G., M. & G. 823; explained in *Freme v. Brade*, 2 De G. & J. 582.

(*y*) *Drysdale v. Piggott*, 8 De G., M. & G. 546; 2 Jur., N. S. 1078; 22 Beav. 238.

ever, entitle the debtor to a policy kept up by the creditor, if there were no stipulation by the debtor for an insurance; the matter is then at the option of the creditor, who, whether he effects an insurance, or by retaining the money becomes his own insurer, is equally entitled to the benefit of the arrangement (z).

In the case of *Freme v. Brade*, and also in *Lea v. Hinton*(a), in which the policy having been effected as an indemnity by the joint act of all parties, was held to belong to the debtor, the creditor became the executor of the debtor; but it does not appear that in the one case the creditor's right to the policy was lessened by this circumstance, or that in the other the debtor's right was founded upon it. And it is evident that the fiduciary relation between the creditor and the debtor's estate, only arose after the date of the security, viz., at the time of the debtor's death: whereas, if by the terms of the security itself, the creditor be placed in the position of a trustee, as if the security be assigned to him upon trust after payment of costs to retain the debt, and pay over the surplus, he must account for the insurance money after deducting the premiums; being within the principle which forbids dealings by a trustee with the trust estate for his own benefit (b).

**1725.** It has also been held (c) that a mortgagor of policies of insurance, or the vendor of a reversionary interest, who has assigned policies to the purchaser, which the mortgagee or assignee has kept on foot at his own expense, has no claim upon them, or the produce of such of them as have been sold, when the security or sale has been set aside; on the ground that the contract under which they were kept up having been

(z) *Freme v. Brade*, 2 De G. & J. 582; 4 Jur., N. S. 746. See *Knox v. Turner*, supra.

(a) 19 Beav. 324; 5 De G., M. & G. 823, explained in *Freme v. Brade*.

(b) *Andrews, Exp.*, *Emmett*, Re, 2 Rose, 410. An Irish case was distinguished from this, not only on account of the absence of an express trust, but also because in Ireland the insurer

need not be interested in the subject-matter of the insurance, and therefore could not, as in *Andrews, Exp.*, have insured only by virtue of an interest derived from the mortgagor. (*Bell v. Ahearne*, 12 Ir. Eq. R. 576.)

(c) *Pennell v. Millar*, 23 Beav. 172; *Foster v. Roberts*, 29 Beav. 467; 7 Jur., N. S. 400; *Bromley v. Smith*, 26 Beav. 644; 5 Jur., N. S. 833.

declared void, no obligation arose out of it between the parties, and the result was the same as if the mortgagee had kept up the policies for his own pleasure.

**1726.** Where a mortgage creditor insured a life to secure himself against a certain risk, and the risk ceasing, the office nevertheless paid him the amount secured by the policy; it was held, that his right being only to guarantee himself against a loss by the particular risk, the guarantee was satisfied when the risk ceased; and, therefore, that the money was not paid by the office under the contract of indemnity effected by the policy, and was not a payment in part discharge of the security (*d*).

The principle that life insurances are contracts of indemnity, being now exploded (*e*), the reason for this distinction seems to have failed, and the case would perhaps now be decided upon the ordinary principles relating to policies of insurance effected as collateral securities.

**1727.** If an annuity be granted for lives, which are insured by the grantee, the insurance money received by him on the dropping of one of the lives will not be applied either in payment of arrears of the annuity, or in part redemption; but may be held by the grantee, at least until complete redemption, as compensation for the loss to his security from the dropping of the life (*f*).

**1728.** An agreement may be expressed or inferred, under which the debtor shall take the benefit of the insurance. Thus an agreement (*g*), that if redemption shall take place, after the premiums shall have been paid for the current year, the mortgagor shall repay the mortgagee such proportion of that premium as shall belong to the then unexpired part of the current year, has been held to be sufficient evidence of an intention,

(*d*) *Henson v. Blackwell*, 4 Hare, 434.

(*e*) *Dalby v. India and London Life Assurance Co.*, 18 Jur. 1024; see also *Law v. London Indisputable Life Po-*

*licy Co.*, 1 Kay & Jo. 223.

(*f*) *Milliken v. Kidd*, 2 Con. & L. 442.

(*g*) *Williams v. Atkyns*, 2 Jo. & Lat. 603.

that the policy should be assigned with the principal security, upon redemption; even without regard to subsequent words importing yet more clearly a right in the mortgagor, to require an assignment of the policy. But the passing of letters between the parties, which refer to the necessity for the insurance; or a provision in the principal security for payment by the debtor of the additional premiums, which in certain events might become payable upon the policy; or a covenant by the *cestui que vie* of the annuity, to do the necessary acts for the effecting of the insurance; are not sufficient (*h*) to give the mortgagor or grantor of the annuity a title to the policy: for these are only statements of, or references to the terms, upon which the transaction was effected, and afford no evidence of a contract, which will take the case out of the general rule.

Nor does it affect the question, that the policy recites that the insurer has an interest in the life of the insured, which interest, by the redemption of the security, has since ceased (*i*).

It seems that letters which have passed between the parties may be looked at, in order to ascertain whether there were any contract concerning the right to the policy, where there is no discrepancy between the letters and the security (*h*); though it would be otherwise if the effect of the letters would vary the stipulations of the security (*l*).

**1729.** If there be an actual contract that the policy shall be assigned to the grantor, on redemption of the security, if he shall elect to take it, then, although the grantee may be under no obligation to keep up the policy even after the grantor has elected to take it, he has clearly no right after such election to dispose of it for his own benefit. And it was considered, that he could not do so even before election; for the notice of election does not change the rights of the parties, being only part of the transaction of repurchase (*m*).

(*h*) *Gotlieb v. Cranch*, 17 Jur. 686; on app., *id.* 704; 4 De G., M. & G. 440.

(*i*) See also *Dalby v. India and London Life Assurance Co.*, 18 Jur. 1024.

(*h*) *Gotlieb v. Cranch*, 17 Jur. 686, 704.

(*l*) See *Squire v. Campbell*, 1 Myl. & C. 459.

(*m*) *Hawkins v. Woodgate*, 7 Beav. 565.

**1730.** Where an assignment of a life policy made as a collateral security on a mortgage of realty, was followed by trusts for the application of the monies to be received under the policy, on the construction of which the court refused to decree a sale of the policy (in a suit for foreclosure of the real estate) as inconsistent with the trusts; the mortgagee was suffered (*n*) to retain the policy, that he might apply the fruits of it upon the mortgagor's death, in making good any deficiency in the value of the real estate.

**1731.** If a lessee mortgage his interest, the benefit of a fire insurance, effected in the names of himself and the lessor, with a provision that the money payable under the policy should be applied in restoring the premises, passes by, though it be not mentioned in the mortgage; and the mortgagor will be ordered to sign a joint receipt with the lessor to the office for the money. Neither has the mortgagor any equity to be repaid, out of the produce of the policy, money expended by him about the rebuilding of the property, the expenditure being voluntary (*o*) (**1528**).

But a mere covenant by the mortgagor with the mortgagee to effect an insurance, does not imply that the mortgagee shall have the benefit of the insurance, either in discharge of the debt or in the restoration of the property, if there be no stipulation to that effect (*p*).

### *Of Judgments for Sale.*

**1732.** Where the judgment is for sale, instead of foreclosure, the direction is, that upon default in payment the property comprised in the security be sold, and the produce applied in discharge of the security; and if the goodwill of a trade carried on there be sold with the property, it is considered as an advantage attached to its possession, the benefit of which belongs to the mortgagee (*q*). If the estate be sold by consent

(*n*) *Dyson v. Morris*, 1 Hare, 413.

143.

(*o*) *Garden v. Ingram*, 23 L. J., Ch. 478.

(*q*) *Chisum v. Dewes*, 5 Russ. 29; *King v. Midland Railway Co.*, 17 W.

(*p*) *Lees v. Whiteley*, L. R., 2 Eq.

R. 113.

of all parties, and the purchase-money in court be properly invested, the investment is not made at the risk of the mortgagee, though it may happen to have been made on his application instead of that of the purchaser; being still treated as a creditor, and his interest running on, he will be entitled to be repaid any deficiency, caused by the investment, out of the assets in an administration suit, in which he has proved his debt (*r*). Neither is the investment made for his benefit, so that he cannot claim accumulations arising from the purchase-moneys, unless they have been carried to his separate account (*s*). So where the Crown has sold extended lands, the proceeds of which have been paid into court under an order obtained by the purchaser, and invested; the Crown will receive only its principal, interest and costs, and not a share of the accumulations (*t*). In like manner, if money representing the sum due on a mortgage be paid into court, and the mortgagee be afterwards paid out of the security, the fund in court is released, and the investment and accumulations belong to the mortgagor. And if the fund have been blended with other monies, there will be an inquiry to ascertain how much of the compound fund has arisen from the investment of the mortgage fund, and of the dividends of the stock purchased with it (*u*).

**1733.** The court will direct a sale under 15 & 16 Vict. c. 86, s. 48 (832) in cases of complication or for other special reasons; but not as of course: and it refused to do so where, by reason of the deeds being in the hands of a purchaser without notice, from whom it refused to take them, the court was unable to complete the title or to give possession (*v*).

The statute does not authorize the sale of a mortgaged estate upon an interlocutory application (*x*), or it seems, as a general rule, after the making of the usual foreclosure

(*r*) *Tompsett v. Wickens*, 2 Jur., N. S. 10; 3 Sm. & G. 171.

(*s*) *Irby v. Irby*, 22 Beav. 217.

(*t*) *The King v. De la Motte*, 2 H. & N. 589; and see 25 Geo. 3, c. 35.

(*u*) *Taylor v. Waters*, 1 Myl. & Cr. 267; 5 L. J., N. S., Ch. 210.

(*v*) *Heath v. Crealock*, L. R., 10 Ch. 22.

(*x*) *Wayn v. Lewis*, 1 Dr. 487; 22 L. J., Ch. 1051.



order (*y*), though it has been considered to be within the discretion of the court to make such an order with the consent of the first mortgagee (*z*); and in his absence where the bill had been taken *pro confesso* against him (*a*).

**1734.** If the sale be directed at the request of the mortgagor, or other person to whom the statute gives the right of demanding it, without the consent of the mortgagee, or those claiming under him, the deposit required by the statute is indispensable, whatever may be the value of the estate; because (*b*) the mortgagee is not to run any risk of losing his rights, upon any speculation as to the value.

The amount of the deposit (which will be fixed in the judges' chambers, if the parties do not agree), is in the discretion of the court, and appears to have been generally fixed with reference to the probable expenses (*c*) of the sale; though in a case (*d*) in which a sale was ordered after decree for foreclosure, a sufficient amount was paid in, to indemnify a puisné mortgagee, who had bought in several incumbrances, to the extent of his entire advances. And a reserved price is fixed sufficient to protect the interest of the mortgagee (*e*).

**1735.** Where the sale is directed under circumstances which require a deposit to be made, the order will be to sell, in case the deposit be paid within a short time—as a week—from the date of the certificate of the amount proper to be deposited; or, it is presumed, from the date of the decree if the parties agree at once upon the amount; but in case of default in making the deposit during the same period, or in case no sale shall take place within six months from the date of the certificate, then foreclosure (*f*). The deposit is made for the indemnity of the

(*y*) *Girdlestone v. Lavender*, 9 Hare, liii; 16 Jur. 1081; *Campbell v. Moxhay*, 18 Jur. 641.

(*z*) *Laslett v. Cliffe*, 2 Sm. & G. 278.

(*a*) *Woodford v. Brooking*, L. R., 17 Eq. 425.

(*b*) *Bellamy v. Cockle*, 18 Jur. 465; see *Boydell v. Manby*, 9 Hare, liii;

*Burmester v. Moxon*, 35 Beav. 310.

(*c*) *Bellamy v. Cockle*, 18 Jur. 465; *Whitfield v. Roberts*, 5 Jur., N. S. 628; 28 L. J., Ch., N. S. 431.

(*d*) *Laslett v. Cliffe*, 2 Sm. & G. 278.

(*e*) *Whitfield v. Roberts*, *supra*; *Witts v. Young*, W. N. 172.

(*f*) *Bellamy v. Cockle*, *supra*.

mortgagee, and if the attempt to sell be abortive, it will be applied in discharge of his costs of the sale (*g*).

**1736.** The conduct of the sale will be given in preference to the person by whom it may be most conveniently effected; and where the plaintiff was a second mortgagee, it was therefore given to the first on account of his possession of the deeds (*h*).

**1737.** The period of six months is the time allowed by the court, in cases of sale not under the act, as also in foreclosure cases (**1684**), during which the estate may be redeemed (*i*); under the act the court may order a sale, without giving the usual or any time to redeem. But three months has been taken as a convenient limit adversely to the mortgagor (*k*). Where an order was made for sale on the mortgagee's application (*l*), giving but one month to redeem, the time was supposed (*m*) to have been fixed because a speedy sale was desirable for all parties, and a like period has been given in another case (*n*) where the mortgagee applied for sale. But in the absence of the owners of the equity of redemption, at the hearing, although they appeared in the suit, the court declined (*o*) to use its full power by directing an immediate sale.

And where a judgment creditor applied in a foreclosure suit for a sale, the court refused to act at all upon the statute in the defendant's absence (*p*); though it does not appear, whether he was only absent at the hearing, or had not appeared at all to the claim.

The court has exercised its power of ordering sale without time to redeem, and has done so where the property was unproductive and could not be let; and also where, being held for a short term of years and subject to several incumbrances, the rents were insufficient to keep down the interest on the first

(*g*) *Corsellis v. Patman*, L. R., 4 Eq. 156.

(*h*) *Hewitt v. Nanson*, 28 L. J., Ch., N. S., 49.

(*i*) *Lloyd v. Whittey*, 17 Jur. 754.

(*k*) *Newman v. Selfe*, 10 Jur., N. S. 251; 33 Beav. 522.

(*l*) *Staines v. Rudlin*, 9 Hare, liii, marg.; 16 Jur. 965.

(*m*) See *Lloyd v. Whittey*, supra.

(*n*) *Smith v. Robinson*, 1 Sm. & Gif. 140.

(*o*) *Id.*

(*p*) *Jones v. Bailey*, 17 Beav. 582.

mortgage (*q*); and also as against infant defendants, upon the ground of local and temporary circumstances, which were shown to affect the marketable value of the property (*r*).

Where the security consisted of real and personal property, the decree ordered payment into court of the proceeds of the sale, distinguishing the proceeds of the realty from that of the personalty (*s*).

**1738.** Both in the Admiralty and in Chancery leave will be given to the mortgagee to bid at the sale (*t*); but it will be refused until other ways of selling have failed if the mortgagee is also a trustee, and objection is made by cestuis que trust (*u*). And also if the applicant have the conduct of the sale; in which case if he desire to bid, it seems that the course is to appoint some other person to conduct the sale (*x*). Where an estate was bought by a person having the conduct of the sale, without leave, and in a feigned name, it was ordered to be re-sold; and a much greater price being realized than was paid by the first purchaser, he was ordered to pay the costs (*y*).

**1739.** In bankruptcy, any mortgagee, with the leave of the court first obtained (*z*), which if separately applied for must be obtained at the mortgagee's expense (*a*) (**1623**), may bid at a sale of the mortgaged property; and though he has no right to bid without previous leave, yet under peculiar circumstances, where he has done so, leave has been granted *nunc pro tunc*;

(*q*) *Phillips v. Gutteridge*, 4 De G. & J. 531; *Foster v. Harvey*, 11 W. R. 899.

(*r*) *Mears v. Best*, 10 Hare, li.

(*s*) *Cator v. Reeves*, 16 Jur. 1004, and form there; 9 Hare, liii, marg.

(*t*) *Wilsons*, 1 W. Rob. 173; *Marsh, Exp.*, 1 Mad. 148.

(*u*) *Tennant v. Trenchard*, L. R., 4 Ch. 537.

(*x*) *Domville v. Berrington*, 2 Y. & C. 723; and held, on appeal in bankruptcy, that, notwithstanding the delay of the persons having the conduct of the sale, the conduct should not be

given to the mortgagee, who had leave to bid. (*M'Gregor, Exp.*, 4 De G. & S. 603.) In Ireland leave to bid has been given to the mortgagee, without taking from him the carriage of the decree, where the property was clearly insufficient to pay the debt; especially if there were no *bonâ fide* bidder on a previous sale. (*Straight v. Patterson; Power v. Allen*, 9 Ir. Eq. R. 149 and note; *Steel v. Devonport*, 11 id. 339.)

(*y*) *Sidney v. Ranger*, 12 Sim. 118.

(*z*) *Hammond, Exp.*, Buck, 464.

(*a*) *Robinson, Exp.*, M. & M. 261; *Blakeley, Exp.*, 2 M. & A. 54.

as where he bought without any previous intention to do so, and only to prevent a sale at an undervalue (*b*). He has also been allowed to take a conveyance as purchaser, after a sale to another person, at the price for which the estate was purchased by the latter, on an affidavit of no collusion, and that the object was to save the costs of another sale (*c*).

If an unauthorized purchase be not immediately confirmed, it seems that the proper course is not to set it aside, but to resell and hold the first purchaser to his bargain, unless a better price can be obtained (*d*). And if the mortgagee, having purchased under his own power of sale, afterwards come to the court for a sale, the estate will be put up at the price at which he bought (*e*).

**1740.** Where the mortgagee is a successful bidder he will not be exempted from paying the deposit (*f*); and the conduct of the sale will be with the trustees, even in the case of a legal mortgage, and though the mortgagee waive his right to bid (*g*). He cannot, therefore, have leave to bid unless he will abandon his right to sell under his power (*h*). Where the mortgagee was also the creditors' assignee, the official assignee (consenting) was ordered to conduct the sale, with liberty for the mortgagee to become the purchaser at a price fixed if no bidding were made to that amount (*i*). And in some cases, where the mortgagee has also been the assignee, a solicitor has been named to attend the taking of the accounts, and to conduct the sale on behalf of the creditors at the cost of the estate (*k*). A separate solicitor has also been appointed for the purposes of the sale, when the mort-

(*b*) Pedder, Exp., 3 D. & C. 622; see Yorke, Exp., 3 M. D. & De G. 329.

(*c*) Prevost, Exp., 3 L. J., N. S., Bkcy. 79.

(*d*) Ashley, Exp., 3 D. & C. 510.

(*e*) Francis, Exp., 1 D. & C. 274.

(*f*) Tatham, Exp., 1 M. & A. 335; 4 D. & C. 360; Stephens, Exp., 2 M. & A. 31; Anon., 4 L. J., N. S., Bkcy. 4.

(*g*) Hodgson, Exp., 1 Gl. & J. 12; Smith, Exp., 2 D. & C. 60; Cuddon, Exp., 3 M. D. & De G. 302.

(*h*) Davies, Exp., 3 D. & C. 504; see Commercial Bank, Exp., 9 L. T., N. S. 782.

(*i*) Young, Exp., De G. 146; Holyman, Exp., 8 Jur. 156.

(*k*) Cowdry, Exp., 2 Gl. & J. 272; Greenwood, Exp., 1 D. & C. 542; Lees Exp., 2 D. & C. 360; see Salisbury, Re, Buck, 245.

gagee was solicitor to the fiat (*l*) ; and where the same solicitor was concerned both for the assignees and the mortgagee (*m*).

**1741.** Neither the solicitor to the trustee, except as mortgagee, nor the trustee himself, by reason of their fiduciary position, can generally purchase the mortgaged property, and a purchaser who falls within this disability will be held to be a trustee for the creditors (*n*) ; or a resale will be ordered, at the price which was to have been paid by the purchaser, another solicitor being appointed to conduct it, and the original purchaser being held to his bargain if no better price be obtained (*o*). And a like order has been made where the assignee bought by mistake (*p*).

The same disability applies to the receiver ; though under certain circumstances, or by consent, he may have leave to bid (*q*). Under extraordinary circumstances, however, as where no bidder had appeared at a previous sale by auction, the trustee may be allowed to bid ; but only with the consent of all the creditors who have proved, a part of them being unable to bind the rest ; and the trustee's solicitor will not have the conduct of the sale (*r*).

The trustee is also generally not allowed to have a reserved bidding, on the sale of mortgaged property (*s*). But it was allowed where the value of the equity of redemption greatly exceeded the mortgage debt, on an undertaking to pay the mortgagee his principal, interest and costs (*t*).

**1742.** By analogy to the mortgagee's ordinary right to exercise his power of sale, unless he be paid or tendered the

(*l*) Briggs, Exp., 3 M. & A. 505 ;  
3 Dea. 238.

(*m*) Rolfe, Exp., 1 D. & C. 77 ;  
Mont. 515 ; and see Bromage, Exp.,  
De G. 375.

(*n*) Badcock, Exp., Mont. & M. 231 ;  
see Bennett, Exp., 10 Ves. 380.

(*o*) Farley, Exp., 3 D. & C. 110 ;  
Turvill, Exp., 3 D. & C. 346.

(*p*) Cuddon, Exp., 3 M. D. & De  
G. 302.

(*q*) Anderson v. Anderson, 9 Ir. Eq.  
R. 23.

(*r*) Hodgson, Exp., 1 Gl. & J. 12 ;  
Morland, Exp., Mont. & M. 76 ; Beau-  
mont, Exp., 1 M. & A. 350.

(*s*) Barnard, Exp., Skinner, Re, 1 M.  
& A. 81 ; 3 D. & C. 291.

(*t*) Ellis, Exp., 3 D. & C. 297 ; and  
see Lackington, Exp., Hamlet, Re, 3  
M. D. & De G. 331.

sum due on his security, he may insist upon the execution of the order for sale (*u*). And the court will not postpone it, on the trustee's request, for such a purpose as putting the estate into a course of cultivation with the purpose of increasing its selling value. If the trustee improperly delay the sale of the property, the course of the mortgagee is to prosecute the order for sale which has already been made, and not to apply for a new order (*x*).

**1743.** The rights of equitable incumbrancers on the estate, whether they be plaintiffs or defendants, or only come in under the judgment, are bound by the judgment for sale, in the same manner as the equity of redemption is bound by a judgment for foreclosure. The purchaser, therefore, upon obtaining a conveyance of the legal estate, takes the property discharged of all claims, and is not entitled to any release from the equitable incumbrancers (*y*).

**1744.** If the mortgagee becomes the purchaser, and his principal and interest exceed the purchase-money, he may be let into possession as from a date earlier than that fixed by the contract (*z*).

*Of Judgments and Orders against Infants and Trustees.*

**1745.** Infants may be foreclosed, or a sale may be directed against them; but it was formerly the practice in decrees for these and for many other purposes, to give the infant six months after coming of age, to show cause against the decree (*a*); which indulgence to infants was at first thought (*b*) to have been abolished in all cases by the provision of the act of 11 Geo. 4 & 1 Will. 4, c. 47, s. 10, that in any action or proceeding for the payment of debts, or any other purposes,

(*u*) Belcher, Exp., 2 D. & C. 587.

(*x*) Robinson, Exp., 3 D. & C. 103.

(*y*) Keatinge v. Keatinge, 6 Ir. Eq. R. 43; Webber v. Jones, id. 142.

(*z*) Bates v. Bonnor, 7 Sim. 427.

(*a*) Mallack v. Galton, 3 P. Wms.

352; Bishop of Winchester v. Beavor, 3 Ves. jun. 314; Spencer v. Boyes, 4 Ves. 370; Booth v. Rich, 1 Vern. 295; Bennett v. Edwards, 2 Vern. 392.

(*b*) Powys v. Mansfield, 6 Sim. 637.

against any infant under the age of twenty-one years, the parol should not demur; that is, the infancy should not be set up as a bar to the suit during minority. But it was afterwards held (*c*), that no such effect resulted from this section of the act; because the right of the parol to demur put a stop to any proceeding against the infant: and was therefore altogether different in its nature from the right to show cause, which did not prevent a decree from being made against the infant binding upon him, if no cause were shown within the allotted time. The right to a day to show cause was therefore held to remain unaffected in suits in which a conveyance was required from the infant, as in suits for the foreclosure of equitable mortgages (*d*).

But it seems that the right has been taken away, or affected, by subsequent statutes.

The Trustee Act, 1850 (*e*), gives a general power to courts of equity, when any decree shall be made for the conveyance or assignment of any lands, to declare that any of the parties to the suit are trustees within the meaning of the act, and to make such order as to the estates rights and interests of such persons, as are authorized by the act to be made concerning the estates, rights and interests of trustees. And the courts may make orders (*f*), vesting the estates, or releasing or disposing of the contingent rights of infant trustees, in such persons, and manner, as the court shall direct; which orders are to be as effectual as if the infant trustees had attained twenty-one, and had duly conveyed or assigned the lands in the same manner, and for the same estate, or had released or disposed of the contingent right.

For the better understanding the effect of this statute, upon the foreclosure of equitable mortgages, it will be remembered that whilst a conveyance is required to complete the title by foreclosure of an equitable mortgagee, that of the legal mortgagee requires no such formality: because the legal title is

(*c*) *Scholefield v. Heafield*, 7 Sim. 669; but see 8 id. 470; *Price v. Carver*, 3 Myl. & Cr. 157.

(*d*) *Scholefield v. Heafield*, *Price v. Carver*, *supra*.

(*e*) 13 & 14 Vict. c. 60, s. 30.

(*f*) Sects. 7, 8.

already vested in him, and the equitable right of the mortgagor is completely bound by the decree. And the day to show cause was given to the infant in respect of the conveyance which he was required to make, and not in respect of the equitable right which the decree had already bound. Therefore Lord Hardwicke said (*g*), it was the course of the court not to give a day, unless a conveyance was directed either in form or substance. The case of *Price v. Carver* (*h*), cited above, in which it was held before the Trustee Act, that the day should still be given, appears to be a decision as to equitable mortgages only. Lord Cottenham there observed, that "cases of foreclosure and partition, and all others in which a conveyance is required from an heir, except those in which the parol would demur at law, are cases in which a day is given." And again, "in all other cases" (i. e. except cases of sale for payment of debts), "in which a conveyance is required from an infant, the law remains as before, and the practice therefore remains the same." Now, in cases of partition, Lord Redesdale expressly says (*i*), that the day to show cause is given, where the infancy of any of the parties, or other circumstances, prevent mutual conveyances; the decree being then to make partition, give possession, and order enjoyment, until effectual conveyances can be made. As therefore Lord Cottenham could not have referred to those cases of partition in which the legal estate is outstanding and not in the infant, (for then the conveyance could be made at once), it is plain, that he was also not speaking of foreclosure suits, where no conveyance of the legal estate was required, but of suits (such as that before him) relating to equitable mortgages, where it was necessary to wait for a conveyance, until the coming of age of the infant heir or devisee. There seems, therefore, to be no reason for giving the day to show cause where the security is legal. And this view appears to have been adopted by Lord St. Leonards in foreclosure suits in Ireland, in which, according to the practice there, sales having been

(*g*) *Sheffield v. Duchess of Bucks*,  
West, t. Hardwicke, 682.

(*h*) 3 Myl. & Cr. 157—163.

(*i*) Pleading, 120, ed. 4; 143, ed. 5,  
citing *A.-G. v. Hamilton*, 1 Mad. 214;  
see the form, 2 Eq. Dr. 385.



directed, it was held, that the infants should have no day (*k*). And in a suit in England by mortgagees, to establish their claim against a settlement, it was said that the infant should have a day, if the result of a case at law made it necessary for the infant to execute a conveyance, but not otherwise (*l*).

But the Trustee Act, 1850, puts the infant heir or devisee of the right of redemption of an equitable mortgage in the same position in this respect, as if the mortgage were legal; for it enables the court to make the conveyance, and thereby to complete the mortgagee's title without waiting for the infant's majority. His whole right, both legal and equitable, can now be bound by the decree and order of the court, and the right to the day to show cause, should cease with the reason upon which it was founded.

It is not very clear what view has been taken by the courts upon this subject. Lord Cranworth, V.-C., is reported to have observed, in a foreclosure suit (*m*), that the Trustee Act, 1850, did not alter the right of the infant, in respect of the day to show cause. In a partition suit (*n*), Knight Bruce, V.-C., said, that instead of giving the day to show cause, the court would declare that, after the making of the partition, the infant would be a trustee, within the act, of such parts of the property as should be allotted in severalty to the other parties.

But as in practice the order absolute for foreclosure is made as of course, no application is made for such a declaration, and the practice of giving a day to show cause is still followed (*o*).

**1746.** With respect to sales of mortgaged estates, made in suits for payment of debts, the same statute (*p*) which abolished

(*k*) *Clinton v. Bernard*, Dru. 287; 6 Ir. Eq. R. 355; *Hutton v. Mayne*, 3 Jo. & Lat. 586; 9 Ir. Eq. R. 343; and see *Tilson v. Lawder*, 2 D. & War. 285; *Mahon v. Dawson*, id. 286, n.

(*l*) *Walsh v. Trevannion*, 16 Sim. 180; and see *Williams' Estate*, Re, 5 De G. & S. 515.

(*m*) *Newbury v. Marten*, 15 Jur. 166.

(*n*) *Bowra v. Wright*, 4 De G. & S. 265; 15 Jur. 981; see however *Hancock v. Hancock*, Seton, Dec. 337, ed. 2; 577, ed. 3.

(*o*) See Set. 689, ed. 3.

(*p*) 11 Geo. 4 & 1 Will. 4, c. 47, s. 12.

the right to set up infancy, enacted, that where in any suit, in any court of equity, for payment of the debts of any person or persons deceased, to which their heir or heirs, devisee or devisees, may be subject or liable, such court of equity shall decree the estates liable to such debts, or any of them, to be sold for satisfaction of such debt or debts, and by reason of the infancy of any such heir or heirs, devisee or devisees, an immediate conveyance thereof could not, as the law then stood, be compelled; in every such case, such court shall direct, and if necessary compel, such infant or infants to convey such estates to be sold, by all proper assurances in the law, to the purchaser or purchasers thereof, in such manner as the said court shall think proper and direct: and that every such infant shall make such conveyance accordingly, and every such conveyance shall be as valid and effectual, to all intents and purposes, as if such infant or infants is or are, at the time of executing the same, of the full age of twenty-one years. By a later act (*q*), courts of equity are also authorized to direct mortgages as well as sales to be made, of the estates of such infant heirs and devisees; and also to be made in cases where the tenant for life or first executory devisee of the estate is an infant. And by a yet later act (*r*), the provisions of 11 Geo. 4 & 1 Will. 4, c. 47, were further extended, to any case, in which any lands, tenements or hereditaments, of any deceased person, shall by descent, or otherwise than by devise, be vested in the heir or co-heirs of such persons, subject to an executory devise over, in favour of a person or persons not existing, or not ascertained; and in any such case, courts of equity are authorized to direct such heir or co-heirs, notwithstanding infancy, to convey or otherwise assure the fee simple or other interest to be sold to the purchaser, or as the court shall think proper, and every such conveyance shall be as effectual as if the heir or co-heirs executing the same were seised or possessed of the fee simple or other estate to be sold, and if an infant were of full age.

By the effect of these statutes it is clear that the infant has

(*q*) 2 & 3 Vict. c. 60, s. 1.

(*r*) 11 & 12 Vict. c. 87, s. 1.

no longer a day to show cause in the cases which fall within their provisions (*s*).

**1747.** The Trustee Act, 1850, directs (*t*), that when a decree shall have been made by any court of equity, directing the sale of any lands for the payment of the debts of a deceased person, every person seised or possessed of such lands, or entitled to a contingent right therein, as heir, or under the will of such deceased debtor, shall be deemed to be so seised, possessed or entitled upon a trust within the meaning of the act. And the court may discharge the contingent right, under the will of such deceased debtor, of any unborn person.

And the Trustee Act of 1852, directs (*u*), that when any decree or order shall have been made by any court of equity, directing the sale of any lands, for any purpose whatever, every person seised or possessed of such land or entitled to a contingent right therein, and bound by the decree or order, shall be deemed to be seised, possessed or entitled within the Act of 1850; and the court may, if it think fit, make a vesting order of such lands, which shall be as effectual as a proper assurance made by a person free from disability. In all suits, therefore, in which a sale may be had, and consequently where a sale is made in a foreclosure suit, the court may at once make that conveyance, for which it was formerly necessary to wait until the infant attained his full age. And if the view taken above, as to the failure of the reason for giving a day to show cause against a foreclosure decree of an equitable mortgage, be correct, it should follow that, where a sale is directed in a foreclosure suit, the power of the court to complete the sale against the infant is a good reason for taking away the right to show cause in that case also.

**1748.** The effect of giving the day to show cause in foreclosure suits, was not to enable the infant to ravel into the account, nor even to give him a new right of redemption, but

(*s*) See 3 Myl. & Cr. 163.

(*u*) 15 & 16 Vict. c. 55, s. 1.

(*t*) 13 & 14 Vict. c. 60, s. 29.

only to show error in the decree (*x*). Though in creditors' and other suits, not for foreclosure, it seems the infant was allowed to put in a new answer on coming of age (*y*).

The decree declared (*z*), that the infants should stand absolutely debarred and foreclosed, &c., unless they, upon being served with a subpoena to show cause against the decree, should within six months after they should respectively attain the age of twenty-one years, show unto the court good cause to the contrary. But where there was a defective security, with a covenant for further assurance binding the infant heir, it was ordered (*a*), that upon default, the mortgagees were to be let into possession of the mortgaged premises, and to hold and enjoy the same as against the defendant, until he should attain the age of twenty-one years; and upon his attaining that age, the defendant was to convey or surrender the mortgaged premises to the plaintiffs, upon the trusts of the indenture, unless, upon being served, &c., the defendant should show good cause to the contrary. And the like order upon the infant, to convey or surrender, upon attaining twenty-one, of course also preceded the order for a day to show cause, where an equitable mortgage was foreclosed.

**1749.** It is not the practice to direct a sale against an infant, until the court be satisfied that it is for his benefit. The course is to direct an inquiry (*b*) upon this point, unless it be settled by proper evidence at the hearing (*c*). The same rule prevails as to orders for sale, under 15 & 16 Vict. c. 86, s. 42; and the court accepts the affidavit of the trustees, as sufficient evidence that a sale will be beneficial (*d*).

(*x*) *Mallack v. Galton*, 3 P. Wms. 352; *Bishop of Winchester v. Beavor*, 3 Ves. 314; *Williamson v. Gordon*, 19 id. 114.

(*y*) *Fountaine v. Caine*, 1 P. Wms. 504; *Kelsall v. Kelsall*, 2 Myl. & K. 412.

(*z*) *Seton*, 341, ed. 2.

(*a*) *Spencer v. Boyes*, 4 Ves. 370;

*Oldaker v. Petford*, 2 L. J., Ch. 47.

(*b*) *Davis v. Dowding*, 2 Keen, 247; *Monday v. Monday*, 1 Ves. & B. 223; *Brookfield v. Bradley*, Jac. 632.

(*c*) *Scholefield v. Heafield*, 7 Sim. 669; *Davis v. Dowding*, 2 Keen, 247; *Mears v. Best*, 10 Hare, li.

(*d*) *Siffken v. Davis*, Kay, xxi.

**1750.** By the Trustee Act, 1850 (*e*), the Lord Chancellor (which includes the Lords Justices and other judges intrusted with the care of the persons and estates of lunatics (*f*)) may make vesting orders of lands, or contingent rights in lands, of which any lunatic or person of unsound mind shall be seised or possessed upon any trust, or by way of mortgage. And also orders vesting in any person the right to transfer or receive the dividends of stock, or to sue for and recover any chose in action to which any lunatic or person of unsound mind is solely entitled, upon trust or by way of mortgage; and where the lunatic is entitled jointly with any other person or persons, orders vesting such rights either in the person or persons so jointly entitled, or in such person or persons jointly with any other person or persons. An equitable mortgagor who has become lunatic is a trustee after the estate has been sold in a foreclosure suit (*g*).

And where any infant shall be seised or possessed of any land, or contingent right in land, upon any trust or by way of mortgage, the Chancery division of the High Court may make a vesting order of such lands or rights; and such vesting orders shall respectively vest the lands or rights in such person or persons, in such manner, and for such estate, as the court shall direct (*h*). Under this power, where it was desired to vest the estate in the mortgagee's executors, one of whom was a married woman, so as to enable them to reconvey without an acknowledgment by her under the Fines and Recoveries Act, the estate was vested to such uses as the executors should appoint, and, in default, to the use of them in fee, subject to the equity of redemption (*i*).

And when any person, to whom any lands have been conveyed by way of mortgage, shall have died without having entered into the possession or receipt of the rents and profits thereof, and the money due in respect of such mortgage shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the

(*e*) Sects. 3, 4, 5, 26, 27.

262.

(*f*) Judicature Act, 1875, s. 7.

(*h*) Sects. 7, 8.

(*g*) Rogers, Re, 13 L. J., N. S., Ch.

(*i*) Powell, Re, 4 K. & J. 338.

*reconveyance* of such lands, the court may make a like vesting order (*h*):

1. When an heir or devisee (*l*) of such mortgagee shall be out of the jurisdiction of the court, or cannot be found.

2. Whenever an heir or devisee of such mortgagee shall, upon a demand by a person entitled to require a conveyance of such lands, or a duly authorized agent of such last-mentioned person, have stated in writing that he will not convey the same, or shall not convey the same for the space of twenty-eight days next after a proper deed for conveying such lands shall have been tendered to him by a person entitled as aforesaid, or a duly authorized agent of such last-mentioned person.

3. When it shall be uncertain which of several devisees of such mortgagee was the survivor.

4. When it shall be uncertain as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee, whether he be living or dead.

5. When such mortgagee shall have died intestate as to such lands and without an heir, or shall have died, and it shall not be known who is his heir or devisee.

The order of the court in any one of these cases has the same effect as if the heir or devisee or surviving devisee, as the case may be, had duly executed a *conveyance* or assignment of the lands, in the same manner, and for the same estate (1757).

Where the estate was in an heir at law out of the jurisdiction, though the court could not make an order under sect. 19, because the mortgagee had entered into possession, a vesting order was made under sect. 9, which enables the court to vest lands of which any person solely seised or possessed upon any trust shall be out of the jurisdiction, or cannot be found (*m*).

**1751.** The court will not under sect. 10 of the act, which

(*h*) Sect. 19.

(*l*) As to the words which will amount to a devise of a mortgaged estate, either by a direct gift of the estate itself, or as implied by a gift of

the debt or security, see Jarm. Wills, Ch. 21.

(*m*) Skitter, Re, 4 W. R. 791, see sect. 10, as to persons jointly seised or possessed upon any trust.

enables it to make a vesting order where two persons are jointly seised as trustees, and one of them is out of the jurisdiction, make an order affecting the estate of a joint mortgagee out of the jurisdiction, where the security has only been discharged by the investment in the joint names, of a sum of money which is assumed in his absence to be the amount payable to them (*n*).

**1752.** In every case in which the persons intrusted with the care of the persons and estates of lunatics, or the court, are enabled to make a vesting order affecting lands or contingent rights, the said persons or court may, if it shall be deemed more convenient, appoint a person to convey or assign such lands, or to release or dispose of such contingent rights (*o*).

**1753.** As to lands within the Duchy of Lancaster, or the counties palatine of Lancaster or Durham, the court of the Duchy Chamber of Lancaster, or the Courts of Chancery of the counties palatine respectively, were empowered to make like orders as to lands within their respective jurisdictions, as the High Court of Chancery might make, by virtue of the act. But no person within the limits of the jurisdiction of the High Court were to be deemed by such local courts to be a trustee within the act (*p*).

The powers given to the Court of Chancery and the persons entrusted with the custody of lunatics respectively, extend to all lands and personal estate in the Queen's dominions and colonies, except (as to the powers of the court) Scotland; and except (as to the lunacy jurisdiction) Scotland and Ireland; and may respectively be exercised by the Court of Chancery and persons intrusted with the custody of lunatics in Ireland, with respect to all lands and personal estate in that country (*q*).

**1754.** When any vesting order is made over copyhold or

(*n*) Osborn's Trusts, Re, L. R., 12  
Eq. 392.

(*o*) Sect. 20.

(*p*) Sect. 21.

(*q*) Sects. 54—57.

customary land, with the consent of the lord or lady of the manor, the land will vest without surrender or admittance; and when any person is appointed to convey or assign copyhold or customary land, such person may do all acts, and execute all instruments, for completing the assurance of such lands; and such acts and instruments shall have the same effect, and, subject to the customs of the manor, and the usual payments, shall give the same rights to admission, as if the person in whose place the appointment is made, being free from disability, had duly done and executed such acts and instruments (*r*). Under sect. 2 of the Trustee Act, 1852, a vesting order of copyholds, which the mortgagor has covenanted but has neglected and refused for twenty-eight days after demand to surrender, may be made without serving the mortgagor with the petition (*s*).

**1755.** With respect to the clauses which concern the estates of lunatics and persons of unsound mind, it may be noticed, that under the repealed act of 1 Will. 4, c. 60, the second section of which enabled the Lord Chancellor to direct the committee of a lunatic to convey, although by the fifth section any person might be appointed to convey on the part of a person of unsound mind not found so by inquisition, the appointment of the *ad interim* committee of a person of the latter class was refused; and the petition was directed to stand over until the appointment of a committee (*t*).

**1756.** The word "lands" in the statute of 1850 applies to any estate or interest in land (*u*), and therefore applies to the right of an infant tenant in tail; as does also the act of 1 Will. 4, c. 47, s. 11, which enabled the Court of Chancery, in suits for the sale of real estates for the payment of debts, to order infants to convey such estates (*x*) (**405**).

Where the legal estate is vested in the mortgagee by the

(*r*) Sect. 28.

(*s*) Crowe's Mortgage, Re, L. R., 13 Eq. 26.

(*t*) Poulton, Re, 1 Mac. & G. 100;

1 H. & T. 476.

(*u*) Sect. 2.

(*x*) Radcliffe v. Eccles, 1 Keen, 130.



security, and the equity has been devised, no vesting order of the infant devisee's interest will be made to the purchaser of the estate; because the infant's equitable interest is bound by the decree for sale (*y*).

The estate of the mortgagee, outstanding in his infant heir, may be vested in the devisees of the equity of redemption, subject to a legacy with which it has been charged by the testator (*z*).

**1757.** The nineteenth section has been held (*a*) to authorize an order to vest the mortgaged estate, as to which the mortgagee has died intestate, and where his heir cannot be found, in the executor of the mortgagee; on the ground that "conveyance," and not merely "reconveyance," appears by the concluding words of the section to have been contemplated by the act, a liberal interpretation of which required this construction. The decision clearly rests upon convenience; but it seems to be little in accordance with the familiar rule of construction, which requires, that no words be rejected, upon which a meaning can be put, consistent with the rest of the enactment. Now the clause expressly requires, that the money due in respect of the mortgage *shall have been paid* to a person entitled to receive the same; and this is consistent with a "reconveyance," but not with a conveyance by the heir to the executor, where no money passes, and where, consequently, the words relating to the payment become a dead letter. And upon the ground that in such a case the mortgage debt was not paid, and that a "reconveyance" was not sought, Turner, V.-C. had refused (*b*), before the order above cited was made by the Court of Appeal, to make a vesting order under the nineteenth section; and he pointed out that it might be a reason for the limitation to the case of recon-

(*y*) Williams' Estate, Re, 5 De G. & S. 515.

(*z*) Ellerthorpe, Re, 18 Jur. 669.

(*a*) Boden's Estate, Re, 16 Jur. 279; 1 De G., M. & G. 57; 9 Hare, 820; Lea's Trust, Re, 6 W. R. 482. The Court of Appeal declined to vest the

estate in the administrator, though he was beneficially interested, where there was no present intention to sell or transfer. (Hewitt, Re, 27 L. J., Ch., N. S. 802.)

(*b*) Meyrick's Estate, Re, 9 Hare, 116; 15 Jur. 505.

veyance, that so long as the money remains unpaid there may be equities between the heir and the personal representatives of the mortgagee, with which it would not be convenient that the court, upon such a proceeding, should interfere. Where the security was by way of trust for sale and for payment of the surplus to the borrower, his executors, administrators or assigns, it was considered not to be a mere security for money within sect. 2 of the act so as to authorize an order under sect. 19, but was treated as a case of trust under sect. 15 (c). And the same course was followed where the mortgage contained a power of sale with a similar disposition of the surplus (d).

**1758.** Where the customary fee of copyholds was surrendered by a debtor to his creditor (e), *upon trust* to sell and pay the debts out of the proceeds, and to pay the surplus to the debtor, his executors, administrators and assigns, and more than twenty years after the personal representative of the creditor sold the property for much less than the amount of the debt, the debtor and his customary heir having both in the meantime died intestate, and there being no personal representatives, and the title of the present customary heir not to be proved without great expense; the copyholds were vested in the purchaser without service of notice, either on the customary heir, or the personal representative of the debtor. It was argued in this case, that if any service were necessary, it should be on the personal, and not on the real, representative. But note, that if under a *power of sale* in a mortgage an estate be sold after the death of the mortgagor, it will be real estate; notwithstanding the direction to pay to the executors or administrators; because the equity of redemption has descended or has been devised; but, if the sale be in the lifetime of the mortgagor, the personal representative will be entitled (f) (**813, 890**).

(c) Underwood, Re, 3 K. & J. 745.

(d) Keeler, Re, 32 L. J., N. S., Ch. 101; 11 W. R. 62.

(e) Wise, Re, 5 De G. & S. 415.

(f) Wright v. Rose, 2 Sim. & St.

323; Clarke's Trusts, Re, 22 L. J., N. S., Ch. 230.

**1759.** A lessee who has mortgaged by way of underlease, with a power of sale, and has covenanted to assign the residue of the term as the purchaser shall direct, is not (*g*) however a trustee, for a purchaser of the underlease, under the power; the covenant to assign does not make him a trustee; and though an assignment might be compelled by suit, the court will not make an order under the Trustee Act, which would amount to a decree for specific performance, in the absence of the person who should be the defendant in a suit for that kind of relief. But if the mortgagor covenant in the meantime to hold the outstanding estate upon trust for the mortgagee, he becomes a trustee within the act (*h*).

**1760.** A vesting order has been made of the beneficial interest of infants, and possible unborn children, in land decreed to be sold for payment of debts, and other purposes (*i*), under the combined provisions of the Act of 1852, s. 1, and of ss. 16 and 30 of the Act of 1850; which provide respectively for the release and discharge of the contingent rights of unborn persons, and for declarations concerning the rights of parties to the suit, or the interests of unborn persons who might claim under any party to the suit.

But under the Act of 1850 alone, a vesting order against infants beneficially entitled to real estate, on a certain contingency, was refused (*k*).

Orders under the Trustee Acts concerning lands, stock, or choses in action subject to a mortgage, may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the monies secured by such mortgage (*l*).

### *Of Judgments against Married Women.*

**1761.** If a suit be brought against a *feme covert* owner of the equity of redemption, and her husband, to foreclose, she

(*g*) Propert, Re, 22 L. J., Ch. 948;  
1 W. R. 237.

(*h*) Collingwood, Re, 6 W. R. 536;  
and see 2 Davidson's Conv. 670, ed. 3.

(*i*) Wake v. Wake, 17 Jur. 545.

(*k*) Weston v. Filer, 16 Jur. 1010.

(*l*) Trustee Act, 1850, s. 37.

is liable (though during the coverture) to be absolutely foreclosed; and no day shall be given to her or her heirs to redeem after the determination of coverture (*m*).

But the judgment must be made against married women in the usual form, and an immediate order absolute cannot be made even by consent (*n*).

*Of the Delivery of the Title Deeds.*

**1762.** It is the duty of the mortgagee, who has accepted the mortgagor's notice of discharge, to see that the deeds are forthcoming, and that the mortgagor may be enabled without risk to pay the money, and to take his reconveyance on the day fixed (*o*). Both the judgment in equity and the statutory order staying proceedings on redemption (510) provide for the delivery of the deeds to the redeeming party; and he is entitled to demand them, although by the act of the mortgagee in disposing by a single instrument of the estate, and the debt, other persons have acquired an interest in a title deed of the estate (*p*). This right extends to all assignments and reconveyances executed between the original mortgage and the final redemption (*q*). And where several mortgages upon distinct estates have been transferred by a single deed, one of the mortgagors who comes to redeem singly is entitled to have the deed of transfer delivered to him, upon his covenanting to produce it (*r*) (1637). Where the mortgagee reconveys only part of the estate, and is entitled to retain the deeds by virtue of his absolute title to the greatest part of the property, he ought also to covenant with the redeeming party for production (*s*).

When the estate has been sold in a suit and the money has been paid into a general account, the purchaser is entitled to insist upon the delivery to him of the title deeds, before any dealings take place with the purchase-money (*t*).

(*m*) *Mallack v. Galton*, 3 P. Wms. 352.

(*n*) *Harrison v. Kennedy*, 10 Hare, li.

(*o*) *Lord Middleton v. Eliot*, 15 Sim. 531.

(*p*) *Dobson v. Land*, 4 De G. & S. 575, 581.

(*q*) *Hudson v. Malcolm*, 10 W. R. 720.

(*r*) *Capper v. Terrington*, 1 Coll. 103; 13 L. J., N. S., Ch. 239.

(*s*) *Yates v. Plumbe*, 2 Sm. & Gif. 174.

(*t*) *Fowler v. Scott*, W. N. 1871, 248.

**1763.** It is usual for the mortgagee to be prepared with an affidavit of the documents, to be delivered up in case of redemption; and the mortgagor may require the affidavit at his own expense, but he should give previous notice to the mortgagee of his intention, and in case of his neglect to do so, and of the non-production of the affidavit, a new day must be fixed for payment (*u*).

**1764.** In case of foreclosure, it has been said (*x*) that the common decree does not direct delivery of the deeds by the mortgagor, especially where the mortgage is for a term, which, however great may be the length of the term, gives the termor no right to the title deeds of the estate; and that the order for delivery is only made where there is a special contract to deliver the deeds upon default of payment of principal and interest.

It is, however, submitted that the true reason for omitting the direction in the case of a mortgage in fee is, that the mortgagee who forecloses, either by direct delivery, from the mortgagor upon the making of the security, or from another incumbrancer whom he has redeemed, has the deeds already in his possession; and a modern decree on an equitable mortgage shows (*y*), that where all the deeds are not already in the mortgagee's custody, the decree, after directing the mortgagor to convey on default of payment, goes on to order delivery of the deeds.

A judgment of foreclosure may be made at the suit of a first mortgagee without any order against the holder of the deeds for the delivery of them; as where they are in the hands of a person who has taken them *bonâ fide* and without actual or constructive notice of fraud from a person without title (*z*).

**1765.** Upon the sale of a ship in the Admiralty, for the satisfaction of bottomry, or other claims (**857**), the title is complete without any delivery of the register. And no order will be made for its delivery against the official agent of a foreign

(*u*) *Weeks v. Stourton*, 11 Jur., N. S. 278.

(*y*) *Holmes v. Turner*, 7 Hare, 370, n.

(*x*) *Wiseman v. Westland*, 1 Y. & J. 117.

(*z*) *Kendall v. Halls*, 11 Jur. 864.

government, who alleges that he detains it under the law of his own country.

But the court will order delivery of the register in the case of a British vessel, because its production may be necessary at the custom-house (*a*).

*Of the Loss of the Title Deeds.*

**1766.** The mortgagee will not be deprived of the benefit of his security by reason of the loss of the title deeds, if the court be satisfied that a security was effected and that they have really been lost (*b*).

If the title deeds of the estate have been mislaid or lost by, or stolen out of the custody of, the mortgagee, or his agent, the court, either in a redemption or foreclosure suit, will direct an inquiry according to the circumstances, as to what deeds or documents were delivered to the mortgagee, and whether they are or not existing, or lost, or in the power of the mortgagee to produce, or what has become of them (*c*).

If the deeds be certified to be lost, or are known to have been destroyed by the mortgagee, an inquiry will be directed as to what indemnity or security ought to be given in respect of the loss (*d*), and also as to what ought to be allowed as a sufficient compensation for the damage done to the estate by the loss or destruction of the deeds (*e*); which compensation is given in respect of the expense to arise on future dealings with the estate, in getting office copies of the decree and other proceedings in the suit, which must thenceforth form part of the title; and not as speculative damages (*f*) for injury occasioned by the absence of the deeds at a sale; and the amount of the compensation will be set off against the principal and interest due on the security.

(*a*) Tremont, 1 W. Rob. 163.

(*b*) Baskett v. Skeel, 11 W. R. 1019.

(*c*) Smith v. Bicknell, cited 3 Ves. & B. 51; Stokoe v. Robson, 3 Ves. & B. 51; Bentinck v. Willink, 2 Hare, 1; Luccraft v. Hite, cited 2 Hare, 14.

(*d*) Lord Middleton v. Eliot, 15 Sim. 537.

(*e*) Hornby v. Matcham, 16 Sim. 325; 12 Jur. 825.

(*f*) Brown v. Sewell, 11 Hare, 49; 17 Jur. 708; and see Macartney v. Graham, where the document lost was a bill of exchange, and only indemnity was given; 2 R. & M. 353.

**1767.** The mortgagee will also be directed to deliver upon oath attested copies of such of the documents destroyed, of which attested copies can be made or had. And if it be found or appear that the deeds were stolen, an indemnity will be decreed (*g*), but no liability arises for compensation in such a case, whether the deeds were in the possession of the mortgagee himself, or of his solicitor or agent, in whose custody he might properly have left them if they had been his own, and no fraud or collusion be shown (*h*); although the circumstance that the deeds were lost out of the custody of the solicitor of the mortgagee, for whose convenience they were so deposited, seems in one case (*i*) to have been thought a reason (amongst others) for giving compensation.

**1768.** And if the result of the inquiry be merely that the deeds are not to be found, it seems that an indemnity only, and no compensation, will be directed, for the party chargeable is then entitled to assume that which is most for his own advantage, viz., that the deeds were stolen, or are otherwise missing, not by reason of any wrong or negligence on his part (*h*).

Where the deeds were lost by or stolen from one of several mortgagees, being executors, against the survivors only of whom the suit was brought, without joining the representatives of him who was the cause of the loss, no indemnity or compensation was given (*l*).

**1769.** Where the mortgagee, suing in right of his wife, an administratrix, was unable to produce the deeds by reason that the wife, who was separated from him, and had possession of the deeds, had delivered them to her attorney, who claimed to hold

(*g*) *Shelmarline v. Harrop*, 6 Mad. 39 (see form of bond of indemnity in *Stokoe v. Robson*, id. p. 41).

(*h*) *Jones v. Lewis*, 2 Ves. sen. 240; and see *Woodman v. Higgins*, 14 Jur. 846.

(*i*) *Brown v. Sewell*, 17 Jur. 708; 11 Hare, 49.

(*h*) *Smith v. Bicknell*, cited 3 Ves. & B. 51; *Stokoe v. Robson*, 19 Ves.

385. See 17 Jur. 709. In *Lord Middleton v. Eliot* (supra), there was loss unexplained, but traced to the negligence of the mortgagee's agent: no compensation was directed or sought, and there was a previous correspondence on the footing of indemnity only.

(*l*) *Smith v. Bicknell*, cited 3 Ves. & B. 51.

them adversely, an account was ordered to be taken of the principal, interest and costs ; the amount to be paid into and to remain in the bank, until the deeds could be secured and a reconveyance had (*m*).

**1770.** The court will give compensation for the loss of deeds if the justice of the case require it, under the prayer for general relief, though indemnity only be sought by the bill (*n*).

Where the value of the mortgaged estate was 20,000*l.*, and the amount of the mortgage debt about 9,300*l.*, the sum of 500*l.* was proposed and approved of (*o*) as a proper compensation for the loss of the title deeds and documents (**1640**).

*Of the Order absolute for Foreclosure.*

**1771.** Upon an affidavit of nonpayment of the money at the appointed time and place, or subsequently, to the person to whom it is directed to be paid, or his agent, the order for foreclosure contained in the original judgment (**1665**) will be made absolute by an order, which is obtained as of course, on motion (*p*). And this final order of foreclosure must be obtained, before an account is taken of subsequent interest and costs, and a time appointed for the exercise of the next right of redemption (*q*). And if great delay take place in obtaining it, the court will require an explanation, and the owner of the equity of redemption must be served (*r*).

**1772.** If the person entitled attends by his agent, the agent ought to be authorized by a power of attorney to receive the money ; and for want of such authority, the court has refused to make the order absolute, though no person appeared to make the payment (*s*). Orders have, however, been made when the

(*m*) *Schoole v. Sall*, 1 Sch. & Lef. 176.

(*n*) *Brown v. Sewell*, 17 Jur. 708; 11 Hare, 49.

(*o*) *Hornby v. Matcham*, 16 Sim. 325.

(*p*) *Seton*, 393, ed. 3; *Dan.* 897, ed. 4.

(*q*) *Whitbread v. Lyall*, 8 De G., M. & G. 314; 2 Jur., N. S. 671; 3 Sm. & G. 314.

(*r*) *Rees v. Coke*, L. R., 6 Ch. 645; per Lord Hatherley.

(*s*) *Gurney v. Jackson*, 1 Sm. & G. xxvi.



person entitled himself attended during a portion of the time between the hours fixed for payment; and also where he has not so attended (*t*) (1277).

1773. A general order of the Court of Chancery provided (*u*) that where a defendant makes default at the hearing, the decree should be absolute in the first instance, without giving the defendant a day to show cause; and should have the same force and effect as if it had been a decree *nisi* in the first instance, and had been afterwards made absolute in default of cause shown by the defendant. And it is presumed that this practice will continue under the Judicature Acts. The course is, for the court to hear the cause, and to give the plaintiff the judgment, to which, upon the pleadings and evidence, it judges him to be entitled (*v*).

1774. Under another order of the Court of Chancery (*x*), such decree was to be made upon the hearing of a cause in which the bill had been ordered to be taken *pro confesso*, as to the court seemed just; and in the case of any defendant who had appeared at the hearing, and had waived all objection to such order, or against whom the order had been made, after appearance by himself, or his own solicitor, or upon notice served on or after the execution of a writ of attachment against him, the decree was to be absolute. It seems, that under the circumstances mentioned in the latter part of the order, the judgment for foreclosure should now be absolute in the analogous case of a motion for judgment on default of pleading by the defendant (*y*); but the point does not appear to have been noticed in *Hate v. Snelling* (*z*).

(*t*) *Lechmere v. Clamp*, 31 Beav. 578; 9 Jur., N. S. 482; *London Monetary, &c. Society v. Brown*, 16 W. R. 782; *Postlethwaite v. Tavers*, W. N. 1871, 173. In *Bernard v. Norton*, 3 N. R. 701, following *Anon.*, 1 Col. 273, an order absolute was made, though the mortgagee attended during a part only of the time fixed; and this appears to be sufficient; but in *Lechmere v. Clamp*, supra, Lord Romilly said that the al-

leged order in *Anon.*, 1 Col., did not exist or could not be found.

(*u*) Cons. Ord. XXIII. s. 12.

(*v*) *Hayes v. Bryerly*, 3 Dru. & War. 274; *Hakewell v. Webber*, 9 Hare, 541; Jud. Act, 1875, Ord. XXXVI. r. 18.

(*x*) Cons. Ord. XXII. s. 8.

(*y*) Jud. Act, 1875, Ord. XXIX. r. 10.

(*z*) W. N. 1876, 77.

Where the bill had been taken *pro confesso* against a defendant, who did not appear at the hearing, a decree of foreclosure absolute in the first instance was refused (*a*); it being considered that the plaintiff was only entitled to such a decree as he would have had if the defendant had appeared at the hearing; but, it is submitted, that the expression "such a decree as seems just," means a decree according to the merits of the case; and that the decree should have been in an absolute form, according to Cons. Ord. XXIII. s. 12, cited above.

The court refused to dispense with service of the copy, decree and proceedings, directed by Cons. Ord. XXII. s. 8, where a bill had been taken *pro confesso*, upon the ground of the expense and difficulty of making the service. If the service could not be, or was not, duly effected, the proper course for the plaintiff (*b*) was to apply to the court, at the end of three years (*c*), for an order to make the decree absolute; and if the court was satisfied with the reasons for non-service it would then dispense with the service. The order to dispense with service was not generally made till the three years had expired (*d*), but where the defendant was a trustee, living out of the jurisdiction, and the *cestuis que trust* were parties, the dispensation was granted; the plaintiff, however, expressing that he was willing to wait until the end of the three years before making the order absolute (*e*).

**1775.** The court will add to the judgment of foreclosure on an equitable mortgage, a declaration under sect. 30 of the Trustee Act, 1850, that a mortgagor out of the jurisdiction is a trustee for the mortgagee, and will make a prospective order vesting the property in the equitable mortgagee (*f*). But it has been said, that such a declaration ought not to be made as an addition to the common order to make the

(*a*) *Brierly v. Ward*, 15 Jur. 277; 20 L. J., N. S., Ch. 46.

(*b*) *Vaughan v. Rogers*, 11 Beav. 165.

(*c*) Cons. Ord. XXII. s. 15 (3). As to service of and dispensing with notice under Cons. Ord. ss. 11, 12 (87th Ord. May, 1845); see *Trilly v. Keefe*,

16 Beav. 83; *Thurgood v. Cane*, 32 Beav. 156.

(*d*) *James v. Rice*, 5 De G., M. & G. 463.

(*e*) *Benbow v. Davies*, 12 Beav. 421.

(*f*) *Lechinere v. Clamp*, 30 Beav. 218.

judgment absolute, but should be made on a separate application (*g*).

**1776.** The order absolute, so far as it concerns infant defendants, must contain the same declaration, giving the infants a day to show cause upon attaining twenty-one, as the original judgment (*h*); if it be proper to give it there (**1747**). If it be clearly for the benefit of the infant, as where the security is insufficient, and the plaintiff offers to pay his costs, no day will be given (*i*).

**1777.** The order for foreclosure does not relate back to the judgment for an account, so as to make the mortgage real estate from that time; it is not until the final order that the quality of personalty is lost (*k*).

**1778.** A release after judgment of foreclosure is equivalent to an absolute foreclosure by order (*l*) (**534**).

*Of the Dismissal of the Action for Redemption.*

**1779.** The suit for redemption will be dismissed, on motion of course, upon production of the certificate of the amount due, and of an affidavit of attendance and nonpayment of the money (*m*) (**1175**); even though after the time fixed for payment the mortgagor have tendered the principal and interest, with an additional sum for interest, to the day of tender (*n*). But the special circumstances seem to make it proper in such a case to move upon notice.

(*g*) *Smith v. Boucher*, 1 Sm. & Gif. 72; 16 Jur. 1154. But it is said to have been made in *Lechmere v. Clamp*, 31 Beav. 578; though it was also made on the original hearing according to 30 Beav. 218.

(*h*) *Williamson v. Gordon*, 19 Ves. 114.

(*i*) *Billson v. Scott*, 2 Set. 686, ed. 3; *Croxon v. Lever*, 10 Jur., N. S. 87.

(*k*) *Thompson v. Grant*, 4 Mad. 438.

(*l*) *Reynoldson v. Perkins*, Ambl. 565.

(*m*) *Stuart v. Worrall*, 1 Bro. C. C. 581; *Proctor v. Oates*, 2 Atk. 140; *Marshall v. Gray*, 2 Atk. 287.

(*n*) *Faulkner v. Bolton*, 7 Sim. 319. According to the report in 4 L. J., N. S., Ch. 81, the motion to dismiss was refused; but the registrar, Mr. Clowes, on reference to the Reg. Lib., finds that the report in Simons is correct.

**1780.** Dismissal of the suit to redeem, by reason of default in payment of the money, or for any other cause than for want of prosecution, operates as a judgment of foreclosure (*o*) (**1170**), because the mortgagor admits by his suit the title of the mortgagee and the debt; and if he does not discharge it, is not allowed to harass the mortgagee by another suit for the same purpose. But if a suit to redeem an equitable mortgage be dismissed by the mortgagor (*p*), it has not the effect of a foreclosure, because the mortgagee does not get the relief which he would have in a foreclosure suit, viz. a conveyance; and if the mortgagee has refused redemption, except on the terms of the discharge of another security, there is no admission by the mortgagor of the debt upon the security for which the foreclosure would operate; and this seems to show that the rule would not operate under such circumstances in the case of a legal mortgage. The rule applies to a Welsh mortgage if the mortgagor make default after obtaining a judgment for redemption, though there be no ordinary right to foreclose (*q*) (**11**). And in a judgment to redeem an annuity, a declaration that in case of dismissal on nonpayment, the annuity shall be considered as a mortgage debt, and shall be irredeemable accordingly, prevents the grantor from raising in future any question as to the validity of the annuity; and he will be restrained accordingly from proceeding at law for that purpose (*r*).

**1781.** The suit will be dismissed at the hearing, if the right to redeem be repelled by the court; and the dismissal was held upon appeal to be proper, where the plaintiff having claimed an absolute right to redeem upon certain terms, the decision was, that he had no equity to redeem upon those terms (*s*).

So in a suit for redemption or foreclosure, by a person who is subject to the same equities as the mortgagor, the suit will

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| ( <i>o</i> ) <i>Cholmley v. Oxford</i> , 2 Atk. 267; | 10 Ch. 250.  |
| <i>Bishop of Winchester v. Paine</i> , 11 Ves.       | ( <i>q</i> ) <i>Curtis v. Holcombe</i> , 6 L. J.,    |
| 199; <i>Hansard v. Hardy</i> , 18 Ves. 460;          | N. S., Ch. 156.                                      |
| <i>Inman v. Wearing</i> , 3 De G. & S. 734.          | ( <i>r</i> ) <i>Flight v. Chambre</i> , 14 Jur. 123. |
| See <i>Wood v. Surr</i> , 19 Beav. 551.              | ( <i>s</i> ) <i>Seagrave v. Pope</i> , 16 Jur. 1103; |
| ( <i>p</i> ) <i>Marshall v. Shrewsbury</i> , L. R.,  | 1 De G., M. & G. 803, n.                             |

be dismissed as against a defendant, who, as between himself and the mortgagor, is not liable to be foreclosed by incumbrancers on the estate, having prior rights to such defendant. Thus, where A. was a mortgagor, B. and C. incumbrancers, and X. tenant in tail in remainder, whose estate, as between himself and A. was not liable to the incumbrances of B. and C., having been exonerated therefrom by A.'s covenant; a bill by E., a subsequent judgment creditor of A., was dismissed against X. (*t*); because E. was not in the position of a purchaser for valuable consideration without notice, but was subject to the same equities as A., and could not compel X. to pay off B. and C. (1150, 1795).

And the same principle was applied where the suit was by the assignee of the insolvent mortgagor and covenantor (*u*).

The suit for redemption will also be dismissed, if, at the hearing, the plaintiff refuse to ask for any accounts (*x*); which may happen when the plaintiff, being a puisné incumbrancer, finds that the security is altogether insufficient.

**1782.** It is the practice to dismiss the suit, as against defendants who disclaim all interest in the mortgaged premises, where such defendants are able to make and do make a complete and valid disclaimer; and provided the disclaimer be complete, it is equally good, whether it were made before or after the commencement of the action (*y*) (1650, 1797).

But if the disclaimer be insufficient in form, or ineffective by reason of the disability of the disclaiming party, the judgment will be for foreclosure.

The first defect arises where the pleadings admit that the

(*t*) *Hughes v. Williams*, 3 Mac. & G. 683. But, *semble*, that X. should first have had a permissive right to redeem. See *Chappell v. Rees*, *infra*.

(*u*) *Chappell v. Rees*, 1 De G., M. & G. 393 (1796).

(*x*) *Gibson v. Nicoll*, 9 Beav. 403; 10 Jur. 419.

(*y*) *Aldworth v. Robinson*, Reg. Lib. 1839, fo. 874; *Thompson v. Kendall*, 9 Sim. 397; *Silcock v. Roynon*, 2 Y. &

C. C. C. 376; *Lock v. Lomas*, 15 Jur. 162; *semble*, also in *Ford v. Earl of Chesterfield*, 16 Beav. 516; *Vale v. Merideth*, 18 Jur. 992; *Thorneycroft v. Crockett*, 2 H. of L. C. 239, where, so far as appears by the report, a trustee against whom the bill was dismissed merely stated by his answer, and it appeared, that he had never acted, and had formally renounced the trust by deed.

estate is vested in the party, and contain an entire or partial disclaimer only of any interest therein; as where (z) the provisional assignee of an insolvent submitted that the estate and effects of the insolvent were vested in him as such provisional assignee, but claimed no interest therein, save such as might be vested in him as trustee for the creditors, whose rights he left to the care of the court.

And a disclaimer by a husband, entitled in right of his wife, and by the wife, seems to have been considered to be imperfect, by reason of the disability of the parties to disclaim by such means; for where an estate in remainder was vested by devise in a son and daughter, the former was dismissed, but not the latter and her husband; though they all claimed to be dismissed by virtue of a joint answer and disclaimer (a). But, in another case (b), the bill was dismissed against an equitable devisee of an estate, and her husband, upon their answer and absolute disclaimer. And it seems that such a disclaimer is good. The Statute of Fines and Recoveries (s. 7) provides for disclaimers by married women, but that provision appears to have been intended to remove a doubt as to their power of disclaiming by deed. Now, it was held (c), where there was a mortgage by husband and wife, without a fine, of lands purchased to the use of them and their heirs, that the wife was bound, after the husband's death, by their joint answer to a bill to foreclose; the answer being held equal to a fine; and so it is conceived the wife's right would be equally bound by their joint disclaimer.

A decision has also been reported in a case (d), in which the mortgaged estate having been devised to a trustee in fee, pending the suit, a bill of revivor and supplement was filed against the trustee, the *cestui que trust*, and the heir of the testator; and the two latter disclaimed, admitting the will and the plaintiff's title: yet upon argument they were foreclosed. The case of *Collins v. Shirley*, cited above, was mentioned as

(z) Appleby v. Duke, 1 Hare, 303;	(b) Buchanan v. Greenway, 11 Beav.
Collins v. Shirley, 1 Russ. & M. 638;	58.
9 Sim. 399, cited from Reg. Lib.	(c) Anon., Mos. 248; S. C., cited
(a) Silcock v. Roynon, 2 Y. & C. C.	1 Vern. 41, n.
C. 376.	(d) Perkin v. Stafford, 10 Sim. 562.

an authority, but the real ground of the decision there seems to have been the imperfect form of the disclaimer; and the case of *Ablett v. Edwards* (e), the particulars of which do not appear, was also cited. The grounds of the decision in the principal case are difficult to understand, though foreclosure was said to be material to the title. If the disclaimer be complete, foreclosure, which implies the presence of an interest to be affected, seems to be something worse than useless; and it is not easy to see what interest could have here remained in the *cestui que trust* after disclaimer, upon which the foreclosure could operate. The case of the heir at law is not more clear, unless, by a refinement of reasoning, the effect of the disclaimer by the *cestui que trust* was thought to leave her interest to descend to the heir, unaffected by his own disclaimer. This case seems, however, to have been subsequently considered as an authority for the foreclosure of disclaiming defendants in a suit in which all the defendants disclaimed (f). In another case (g) it was arranged, that, upon the consent of the assignee of an insolvent to be at once foreclosed absolutely, he should receive his costs. It is possible that foreclosure was required here, with reference to the statute 1 & 2 Vict. c. 110, s. 68, which provided, that where only a provisional assignee should have been appointed, conveyances of the insolvent's interests, which were of no value to the creditors, might be made by order of the court.

(e) Noticed, 10 Sim. 563, n.

(g) *Staffurth v. Pott*, 2 De G. & S.(f) *Johnson v. Clarke*, 3 W. R. 193. 571.





# APPENDIX.

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## DECREES:

- 1783. *Barnes v. Racster.*
- 1784. *Thackwray v. Bell.*
- 1792. *Bell v. Cartwright.*
- 1793. *Hill v. Edmonds.*
- 1794. *Sober v. Kemp.*
- 1795. *Hughes v. Williams.*
- 1796. *Chappell v. Rees.*
- 1797. *Aldworth v. Robinson.*

## OF VARIOUS STATUTES RELATING TO SECURITIES:

- 1798. *Of Securities upon Ecclesiastical Benefices.*
- 1802. *Charitable Trusts Acts.*
- 1803. *Commissioners Clauses Act, 1847.*
- 1804. *Companies Acts.*
- 1808. *Copyhold Enfranchisement Acts.*
- 1813. *County Courts Equitable Jurisdiction Act.*
- 1814. *Improvement Acts.*
- 1819. *Inclosure Acts.*
- 1822. *Lands Clauses Consolidation Act, 1845.*
- 1823. *Land Tax Redemption Acts.*
- 1824. *Municipal Corporation Acts.*
- 1825. *Public Works and Fisheries Acts.*
- 1826. *Railway Companies Securities Act, 1866.*

## 1830. OF STAMPS UPON SECURITIES.

## JUDGMENTS.

BARNES *v.* RACSTER. 22 April, 1842. *Reg. Lib. A.* 1841,  
fo. 1221; *reported*, 1 Y. & C. C. C. 401 (a).

1783.				£		
	1784	Jauncey and wife . . . .		243		
	1792	Barnes (plaintiff) . . . .	A.	292	Foxhall .	X.
	1795	Hartwright . . . .	B.	292	Foxhall .	X.
	1798	Williams . . . .	C.	325		
	1800	Barnes (plaintiff) . . . .	A.	13,553	No. 32 .	Y.

(This being also a further security for the debt secured by the  
deed of 1792.)

				£		
	1801	Williams . . . .	C.	292	Foxhall .	X.
{	1803	Baker and Bury . . . .		143		
		. . . .		13,553	No. 32 .	Y.
	1804	Williams . . . .	C.	13,553	No. 32 .	Y.

The following payments were ordered:—

To Jauncey and wife . . . .	£243
„ Plaintiff a proportionate part of . . . .	292
„ Hartwright, residue of . . . .	same
„ Williams . . . .	325
„ Plaintiff, proportionate part of . . . .	13,553
„ Baker and Bury, further part of . . . .	same
„ Williams, residue of . . . .	same
and . . . .	143

DECREE.—It appearing that the 243*l.* stock will be insufficient for  
payment in full of the amount reported due to the defendants Jauncey,  
and Jane his wife, for principal and interest under the security of  
1784, and their costs,

(a) The dates of the incumbrances are in the first column; the names  
of their owners in the second; the sums of the stock in the fourth represent  
in round numbers the investments of the purchase-mones of the several  
estates; the fifth column contains the names of the several estates as stated  
in the judgment in *Younge and Collier*; and the letters in the third and  
sixth columns refer to the text, where this case is noticed upon the subject  
of marshalling (1150). Followed in *Wellesley v. Mornington*, 17 W. R.  
855.

*Let* the said sum of 243*l.* stock be sold, and out of the produce, and out of the amount due in respect of interest thereon, pay the costs of the above-named defendants, and pay the residue to them in discharge of the said security of 1784.

Produce of security of 1784 to first mortgagees.

*It* appearing that plaintiffs, under their security of 1792, are the first incumbrancers upon estates now represented by 292*l.* stock, and, under their several securities of 1800, are also the first incumbrancers upon estates represented by 13,553*l.* stock, and that the last-mentioned securities are also a further security for the debt secured by the indenture of 1792: And that if the plaintiffs were to resort for payment of the debt due to them to the fund representing the estate comprised in the security of 1792, so far as the same would extend, they would exhaust the whole thereof; and if they were to resort for payment of the debt due to them exclusively to the funds representing the estate comprised in the securities of 1800, they would to a great extent disappoint the third incumbrancers on the last-mentioned fund:

*Declare* that the plaintiffs ought to receive payment of the amount due to them for principal, interest and costs, out of the two funds of 292*l.* stock and 13,553*l.* stock, and the respective amounts of cash which shall be certified to have accrued in respect of the said funds respectively, rateably and in proportion to their respective amounts. *And* let the amount due to the plaintiffs by virtue of their security of 1792, and of their several securities of 1800, and their costs and subsequent interest and costs, be apportioned rateably and in proportion to the amount of the said two funds of 292*l.* stock and 13,553*l.* stock, and the respective amounts of cash due in respect of the said funds respectively, and let the amounts be certified accordingly.

Apportion and pay plaintiffs, in respect of securities of 1792 and 1800, rateably out of Foxhall (X) and No. 32 (Y).

*And* it appearing that the said 292*l.* stock, and the dividends already accrued, or which may accrue due thereon, will be more than sufficient for payment of the proportion of principal, interest and costs of the plaintiff, to be paid out of the said fund, under the declaration hereinbefore contained, but will be insufficient for payment in full of the amount certified to be due to the defendants the Hartwrights, by virtue of their security of 1795, with what shall be due to them for subsequent interest, and past and subsequent costs,

*Let* the said sum of 292*l.* stock be sold, and out of the produce, and out of the cash which has accrued or may accrue due in respect of the said sum of stock, pay the proportion of the plaintiff's costs, payable under the declaration hereinbefore contained, out of the same fund, and also the proportion of principal and interest payable thereout under the said declaration, in part discharge of the plaintiff's security of 1792; and out of the residue of such produce and cash pay the costs of the defendants the Hartwrights. *And* in case

Pay residue of Foxhall (X) to second mortgagees thereof.

the residue shall be more than sufficient for payment of the said costs, *Let* what shall remain of such residue be paid to the defendants the Hartwrights, in discharge of the principal and interest due under their security of 1795.

*And* it appearing that the 325*l.* stock will be insufficient for payment in full of the amount due to the defendant Williams, under his security of 1798, with costs, and subsequent interest and costs,

Pay produce of security of 1798 to C., the mortgagees thereof.

*Let* the said sum of 325*l.* stock be sold, and out of the produce, and out of the cash which has accrued, or may accrue due in respect of the said sum of stock, if the same shall be sufficient, pay the costs of the defendant Williams, and the residue in discharge of the principal and interest due under his security of 1798. *But* in case such produce shall be insufficient for payment in full of the costs of the defendant Williams, pay the whole thereof in part discharge of his costs.

*And* it appearing that the said 13,553*l.* stock, with the dividends thereon, will be more than sufficient for payment in full of the proportion of the amount certified to be due to the plaintiffs under their securities of 1800, and of their costs, and subsequent interest and costs which shall be certified to be payable out of the 13,553*l.* and the cash due in respect thereof: *And* also more than sufficient for payment in full of the amount certified to be due to the defendants Baker and Bury under their security of 1803, and their costs, and subsequent interest and costs, but will be insufficient for payment in full of the amount certified to be due to the defendant Williams under his securities of 1798, 1801 and 1804, and subsequent interest:

Out of residue of No. 82 (Y), pay mortgagees of 1808.

*Let* the said sum of 13,553*l.* be sold, and out of the produce, and out of the cash which has accrued, or may accrue due in respect of the said sum of stock, pay the proportion of the plaintiff's costs, payable under the declaration hereinbefore contained, out of the said fund, and pay the proportion of the amount due to the plaintiffs for principal and interest under their securities of 1800, which, under the said declaration, is payable out of the said fund in further discharge of what is due to them in respect of the same securities, and thereout also pay the costs of the defendants Baker and Bury, and also what is due to them for principal and interest under their securities of March, 1803, in discharge of their said securities; and after payment thereout, in case the costs of the defendant Williams shall have been fully paid under the declaration hereinbefore contained, *Let* the residue of the money to arise by sale of the 13,553*l.* stock be paid to the defendant Williams in part discharge of his principal and interest under the securities of 1798, 1801 and 1804; but if the costs of the defendant Williams shall not have been fully paid under the said declaration, then let so much of the balance of 13,553*l.* stock, and the said apportioned amount of cash, as shall remain after the payments hereinbefore directed to the plaintiffs, and the

*And* then mortgagees of 1798, 1801 and 1804.

defendants Baker and Bury, and for their respective costs, as will make up the deficiency of such costs of the defendant Williams, be paid for the residue of his costs, and let the remainder be paid to him in part discharge of the principal and interest due to him by virtue of the securities of 1798, 1801 and 1804.

And it appearing that the defendants Baker and Bury, who, under their securities of 1803, are first incumbrancers of the estate now represented by the said sum of 143*l.* stock, will be fully satisfied the amount due to them for principal and interest, by virtue of their security of 1803, together with their costs, by the means hereinbefore mentioned: And that the 143*l.* stock, with the dividends thereon, will be insufficient for payment in full of the balance due to the defendant Williams under the securities of 1798, 1801 and 1804, with subsequent interest after the payments hereinbefore directed in respect of his said securities:

*Transfer* the said sum of 143*l.* stock, and pay the cash due in respect thereof to the defendant Williams, in discharge of the securities of 1798, 1801 and 1804. And for the purposes aforesaid, &c.

Pay produce of security of 1803, in further discharge of 1798, 1801 and 1804.

And let the plaintiffs, out of the monies to be received by them under this order, pay to the defendants J. Jauncey, and Jane his wife, the sum of 75*l.* 18*s.* 6*d.*, being the amount of rents and profits which the said defendants ought to have received as first mortgagees. And to the defendant Williams the sum of 101*l.* 18*s.* 6*d.*, being the amount which the last-named defendant ought to have received as first mortgagee.

Mortgagees to be paid certain sums which they should have received.

And that the plaintiffs and defendants do respectively deliver to R. Y., the purchaser of the hereditaments mentioned in the pleadings, all title deeds and muniments of title relating to the said hereditaments and premises in their respective custody, possession or power. Liberty to apply.

Delivery of deeds to purchaser.

### DECREE for Successive Redemptions.

THACKWRAY v. BELL, 1 Feb. 1840.

1784.

T. T. and M. T. (third mortgagees), . . . . . Plaintiffs.  
W. B. (assignee of first mortgagee), J. S. C. and Jane his wife (owners of equity of redemption), S. L. and E. his wife, and M. C. (personal representatives of second mortgagee), and J. M. (his customary heir), Defendants.

September, 1817.—J. H. mortgages copyholds to J. B. to secure 200*l.* and interest.

December, 1818.—Further charge to same to secure 100*l.* and interest, and J. B. duly admitted.

May, 1820.—J. H. surrenders to Jane B., subject to J. B.'s mortgage.

March, 1821.—Jane B. mortgages equity of redemption to T. M.

April, 1823.—Jane B. marries J. S. C.

June, 1823.—J. B.'s mortgages transferred to W. W., who enters into possession of part of the premises.

January, 1825.—J. S. C., and Jane his wife, mortgage part of the estate to T. T. and M. T. the plaintiffs, who enter into possession of part of premises.

————.—W. W. dies, and his representatives surrender to W. B., defendant, who continues in part possession and is admitted.

————.—T. M. dies, leaving defendants S. L. and E. his wife, and M. C., his personal and J. M. his real representatives.

### 1785.

Account of first mortgagee's debt and costs.

Of rents, &c. received by first mortgagee in possession,

to be deducted from debt.

Liberty to personal representatives of second mortgagee to redeem on payment of balance:

And thereupon the first mortgagee to surrender to them.

In default, foreclosure.

DECREE.—*Account* of what is due to the defendant W. B. for principal and interest, in respect of the said several mortgage surrenders of September, 1817, and December, 1818, and for costs properly incurred in respect thereof, and tax him his costs of the suit.

*Account* of the rents and profits of the mortgaged premises received by the said defendant W. B., or by the said W. W. (or his personal representatives), under whom the defendant W. B. claims, or by any other person or persons by his or their order, or for his or their use, or which, without his or their wilful neglect or default, might have been received. *Let* what shall be owing on such last mentioned account of rents and profits be deducted from what shall be found due to the defendant W. B. for principal, interest and costs as aforesaid.

*And* upon the defendants S. L. and E. his wife, and M. C., paying to the defendant W. B. the balance which shall be remaining due to him for such principal, interest and costs as aforesaid, after such deduction as aforesaid, within six months after the certificate of the chief clerk of the judge to whose court this cause is attached shall have been duly signed and approved, at such time and place as shall be appointed by the said certificate,

*Let* the defendant W. B. surrender and re-assign the mortgaged premises comprised in the said mortgage surrenders of, &c., free and clear of and from all incumbrances done by him or any claiming under him, or those under whom he claims, and deliver upon oath all deeds, papers and writings in his custody or power relating thereto, to the said S. L. and E. his wife, and M. C., or as they shall appoint.

*But* in default of the said defendants S. L. and E. his wife, and M. C., paying to the said W. B. such balance as aforesaid, by the time aforesaid, *Let* them stand absolutely debarred and foreclosed of

and from all right, title, interest and equity of redemption of, in and to the said mortgaged premises.

*And in case of such foreclosure, Compute for the defendant W. B. his subsequent interest on his said mortgages, and tax him his subsequent costs of the said suit. And upon the plaintiffs T. T. and M. T. paying to the defendant W. B. what shall be certified to be due to him for principal, interest and costs as aforesaid, after such deduction as aforesaid, within three months after the further certificate, &c., at such time and place, &c., Let the defendant W. B. surrender and re-assign the said mortgaged premises comprised in, &c., free and clear, &c., and deliver upon oath, &c., to the said T. T. and M. T., or as they shall appoint.*

*But in default of the said T. T. and M. T. paying to the defendant W. B. what shall be found due to him as aforesaid, by the time aforesaid, Let them stand absolutely debarred and foreclosed, &c.*

1786.

In such case, compute and tax first mortgagee's subsequent interest and costs, and liberty to third mortgagees to redeem, &c.

In default, foreclosure.

*And in case of such foreclosure, Compute the defendant W. B. subsequent interest on his said mortgages, and tax him his subsequent costs of the said suit, and upon the said J. S. C., and Jane his wife, paying to the defendant W. B. what should be reported due to him for principal, interest and costs as aforesaid, within three months after the further certificate, &c., at such time and place, &c., Let the defendant W. B. surrender and re-assign, &c., and deliver, &c., to the said J. S. C., and Jane his wife, or as they shall appoint.*

*But in default of the said J. S. C., and Jane his wife, paying to the defendant W. B. what shall be found due &c., Let them stand absolutely debarred and foreclosed, &c.*

1787.

In such case, compute and tax first mortgagee's subsequent interest and costs, and owners of equity of redemption to redeem, &c.

In default, foreclosure.

*But in case the said S. L. and E. his wife, and M. C., should redeem the said W. B. as aforesaid, by the time aforesaid,*

*Let an account be taken of what is due to the said S. L. and E. his wife, and M. C., as the executors of T. M. deceased, in the pleadings named, for principal and interest in the mortgage security of the 1st day of March, 1821, made by Jane B. in the pleadings named to the said T. M., and for what the said S. L. and E. his wife, and M. C., shall so pay to the said W. B. for principal, interest and costs as aforesaid, and for interest thereon, and also to tax the said S. L. and E. his wife, and M. C., their costs of the said suit.*

1788.

In case of redemption by representatives of second mortgagee,

Account of their debt, and of what they shall have paid to first mortgagee, and tax their costs,

*And upon the said T. T. and M. T. paying unto the said S. L. and E. his wife, and M. C., what shall be found due to them for such principal, interest and costs as aforesaid, within three months after, &c.,*

*Let the said S. L. and E. his wife, and M. C., re-assign the said mortgaged premises, free and clear, &c., and deliver upon oath, &c., to the said T. T. and M. T., or as they shall appoint.*

And liberty for third mortgagees to redeem them.

In default, foreclosure.

*But* in default of the said T. T. and M. T. paying, &c., *Let* them stand absolutely debarred and foreclosed, &c.

### 1789.

Then compute and tax second mortgagee's representatives' subsequent interest and costs. And owners of equity of redemption to redeem them, &c.

*And* in case of such foreclosure, *Compute* the said S. L. and E. his wife, and M. C., their subsequent interest on their said mortgage, and on what they should have paid to the said W. B., and tax them their subsequent costs of this suit. *And* upon the said J. S. C., and Jane his wife, paying to the said S. L. and E. his wife, and M. C., what should be found due to them for principal, interest and costs as aforesaid, within three months, &c., after the further certificate, &c., *Let* the said S. L. and E. his wife, and M. C., re-assign, &c.

In default, foreclosure.

*But* in default of the said J. S. C., and Jane his wife, paying to the said S. L. and E. his wife, and M. C., what shall be found due to them, &c., *Let* them stand absolutely debarred and foreclosed, &c.

### 1790.

In case of redemption by third mortgagees,

Account of their debt, and of what they shall have paid to second mortgagee's representatives, and tax their costs of suit and of action by them.

*But* in case the said T. T. and M. T. shall redeem the said S. L. and E. his wife, and M. C. as aforesaid, *Let* an account be taken of what was due to the said T. T. and M. T. for principal and interest on their mortgage security dated January, 1825, in the pleadings mentioned, and for what the said T. T. and M. T. shall so pay to the said S. L. and E. his wife, and M. C., for principal, interest and costs as aforesaid, and for interest thereon, and also tax the said T. T. and M. T. their costs of the said suit, and their costs of the action brought, &c.; *And*

And account of rents, &c. received by them.

*Take* an account of the rents and profits of the said mortgaged premises received by the said T. T. and M. T., or either of them, or by any other persons by their or either of their order, or for their or either of their use, or which, without their wilful neglect or default, might have been received.

And deduct rents received from debt.

*And* let what shall be owing on such account of rents and profits be deducted from what shall be found due to the said T. T. and M. T. for such principal, interest and costs as aforesaid.

And redemption by owners of equity of redemption on payment of balance, &c.

*And* upon the said J. S. C., and Jane his wife, paying to the said T. T. and M. T. what shall be found due to them for such principal, interest and costs as aforesaid, after such deductions as aforesaid, within three months after the further certificate, &c.

### 1791.

In default, foreclosure.

*But* in default of the said J. S. C., and Jane his wife, paying to the said T. T. and M. T. what shall be remaining due to them for such principal, interest and costs as aforesaid, by the time aforesaid, the said J. S. C., and Jane his wife, are from thenceforth to be absolutely debarred and foreclosed, &c.

*Usual* directions. Liberty to apply.



DECREE *carrying on Proceedings in former Suit, and directing further Accounts and Redemption.*

SUPPLEMENTAL SUIT TO THACKWRAY v. BELL.

BELL v. CARTWRIGHT.

W. B. . . . . Plaintiff.  
J. S. C. and E. B. . . . . Defendants.

1792.

M. T., one of the former plaintiffs and third mortgagees, died; and her executor and co-mortgagee assigned to W. B., the now plaintiff.

J. C., late defendant and owner of the equity of redemption, also died, having devised her equity, as to three-fifths thereof, to defendant J. S. C., her husband, and, as to two-fifths, to defendant E. B.

Defendants S. L. and E. his wife, and the representatives of the second mortgagee, also assigned to W. B., who therefore acquired the interests of all the incumbrancers.

SUPPLEMENTAL DECREE, 20 Feb. 1854.

*Enter* decree and proceedings in the other suit, and evidence in this suit.

*Enter* proceedings and evidence.

*Let* the decree made in the original cause, *Thackwray v. Bell* and others, in the proceedings mentioned, and dated the 1st day of February, 1840, and the proceedings thereunder, so far as is now necessary, be carried on and prosecuted as between the plaintiffs and the defendants in this suit, in like manner as is thereby directed between the parties to the said suit in which such decree was made.

*Carry on* proceedings in former suit.

*And* let the following inquiry and accounts be made and taken in this cause, viz:—

*Accounts.*

1st. An inquiry of what particulars the property comprised in the several mortgages in the pleadings mentioned consist.

*Particulars of securities.*

2ndly. An account of what is due to the plaintiff by virtue of his mortgage security in the decree in *Thackwray v. Bell* mentioned, and also as assignee of the several mortgage securities, therein also mentioned, of S. L. and E. his wife, M. C. and J. M., the defendants in the former suit, and of T. T. and M. T., the plaintiffs in the said former suit, such account of what is due to the plaintiff to be taken on the footing of the decree in the said former suit.

*Amount due to plaintiff as first mortgagee and assignee of incumbrances on footing of former decree.*

*And* let the proper taxing master of this court tax the plaintiff the costs of this suit, and also his costs as defendant in the said former suit, and also the costs of the said former suit of the plaintiff and the defendants to that suit, S. L. and E. his wife, M. C. and J. M., and of the plaintiffs to the said former suit, T. T. and M. T. *And* let the total amount due to the plaintiff, on taking the accounts

*Tax* plaintiff's costs of this and former suit, and of other parties to former suit.

*And certify* amount due on accounts.

aforesaid, and for all the costs hereinbefore directed to be taxed, be certified.

On payment by tenants in common of equity of redemption,

*And* on the defendants J. S. C. and E. B., or either of them, paying to the plaintiffs such total amount, within six months after the certificate of the chief clerk of the judge to whose court this cause is attached shall have been duly signed and approved, at such time and place as shall be by the said certificate appointed,

Plaintiff to re-convey to defendants,

*Let* the plaintiff surrender and re-assign the premises comprised in the said several mortgage securities, free and clear, &c., and deliver over on oath all deeds, &c., to the defendants, or as they shall direct.

In default, fore-close defendants.

*But* in default of the defendants, or either of them, paying such total amount to the plaintiff, within the time aforesaid, the defendants are thenceforth to stand absolutely debarred and foreclosed, &c.

*Just allowances.* Liberty to apply.

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**DECREE for Redemption by and Foreclosure of Subsequent Incumbrancers and Assignees of the Insolvent Mortgagor of Distinct Estates, upon one of which the Insolvent's Wife has a separate Right of Redemption.**

HILL v. EDMONDS, 1852. *Reg. Lib. A.* 1851, fo. 1380.

1793.

Sarah Hill, William Clarke, John Hurst Wane . . . Plaintiffs.  
Charles Edmonds, James Painton, Thomas Hall,  
Samuel Sturgis, Joseph Bullock, and Anne his  
wife . . . Defendants.

January, 1849.—Distinct mortgages by Bullock and Anne his wife to Hill of wife's freeholds to secure 100*l.*, and of her leaseholds to secure 300*l.*, the deeds of the freeholds being also deposited as security for the latter.

November, 1849.—Second mortgage of whole premises to Edmonds, Painton and Hall.

Hill devises to Clarke and Wane, and appoints them and Sarah Hill (the plaintiffs) executors.

November, 1849.—Bullock becomes insolvent, and Hall is appointed to be his creditors', and Sturgis his provisional, assignee.

Account of what is due on both securities,

**DECREE.**—*Account* of what is due to the plaintiffs for principal and interest in respect of the debt of 100*l.*, and interest secured by the deed of January, 1849; and of what is due for principal and

interest in respect of the debt of 300*l.*, secured by the other indenture of January, 1849, and the agreement of that date.

*Tax* the plaintiff's costs of this suit and apportion such costs between the debts of 100*l.* and 300*l.* respectively ; distinguish the amount due for principal, interest and costs, in respect of the debt of 100*l.* and 300*l.* respectively, and certify the total amount due in respect of the said securities.

Tax and apportion costs, distinguishing the amount due on such security, and certify total.

*Upon* payment by the defendants Edmonds, Painton and Hall, some or one of them, of the total amount due, within six months, &c., *Let* the plaintiffs assign the mortgaged premises free from incumbrances, &c. ; and deliver deeds, &c. to the defendants, or such of them as shall redeem.

Second incumbrancers to redeem on payment of total, or be foreclosed.

*In* default of the said defendants, or some or one of them, redeeming, foreclose them (1785).

And in that case,

*Compute* subsequent interest in respect of both sums, and tax the plaintiffs their subsequent costs, and apportion such subsequent costs (*ut supra*), and distinguish what is due to the plaintiffs for principal, interest and costs, including such subsequent interest and subsequent costs in respect of the said debts of 100*l.* and 300*l.* respectively. And,

Account of subsequent interest and costs, and apportion and distinguish, *ut supra*.

*Upon* payment by Sturgis and Hall (as the assignees of the said Joseph Bullock), or one of them, of the total amount due for principal, interest and costs, and subsequent principal, interest and costs, within three months, &c., *Let* the plaintiffs assign, &c., &c., *In* default of such payment foreclose the said defendants Sturgis and Hall.

Assignees of husband (mortgagor) to redeem on payment of total, or be foreclosed.

And in that case,

*Compute* subsequent interest upon the amount found due to the plaintiffs in respect of the said principal sum of 300*l.*, and tax the plaintiffs their subsequent costs in respect of the said sum of 300*l.* And,

Account of subsequent interest and subsequent costs on 300*l.* security.

*Upon* payment by the defendant Anne Bullock of the amount found due in respect of the said sum of 300*l.*, within three months, &c., *Let* the plaintiffs assign the premises comprised in the security for 300*l.*, to the said Anne Bullock, free, &c. *In* default of such payment, foreclose the said defendant Anne Bullock.

Wife of mortgagor to redeem on payment of amount found due thereon, in default to be foreclosed.

*But* in case the defendants Edmonds, Painton and Hall shall redeem the plaintiffs,

*Take* an account of what is due to them for principal and interest on their security of November, 1849, and compute subsequent interest on what they, or some or one of them, shall so pay to the

In case of redemption by second incumbrancers, Subsequent accounts and redemption by assignees of mortga-

gor upon payment of amount found due to second incumbrancers, and of what they shall have paid, and subsequent interest and costs.

plaintiffs, in respect of the said sums of 100*l.* and 300*l.*, and tax the defendant Edmonds his costs (a). And,

*Upon* the defendants Sturgis and Hall, as such assignees, or one of them, paying to the defendants Edmonds, Painton and Hall, some or one of them, the amount found due to them for principal and interest, and also paying to them or such of them as shall redeem the plaintiffs, what they or he shall so pay the plaintiffs, and subsequent interest thereon as aforesaid, and to the defendant Edmonds his costs of this suit, within three months, &c., *Let* the defendants Edmonds, Painton and Hall assign to the defendants Sturgis and Hall, free, &c.

In default, foreclosure.

*In* default of defendants Sturgis and Hall, or one of them, paying to the defendants Edmonds, Painton and Hall, or one of them, &c., and also paying to the defendants or such of them as shall redeem the plaintiffs, what they or he shall so pay to the plaintiffs, and subsequent interest as aforesaid, and to the defendant Edmonds his costs, foreclose them. And in that case,

Subsequent accounts in respect of the 300*l.* security:

*Compute* subsequent interest on what the defendants Edmonds, Painton and Hall, some or one of them, shall have paid to the plaintiffs in respect of the said security for 300*l.*, and tax the defendant Edmonds his costs of suit in respect of the 300*l.* And upon payment by the defendant Anne Bullock to the defendants Edmonds, Painton and Hall, or such of them as shall redeem the plaintiffs, the amount found due to them in respect of such principal, interest and costs, and to the defendant Edmonds his costs of this suit in respect of the said sum of 300*l.*, within three months, &c., *Let* the defendants Edmonds, Painton and Hall assign the premises comprised in the said security for 300*l.*, free, &c. to the said defendant Anne Bullock.

In default, foreclosure.

*In* default, foreclose her.

In case of redemption by assignees,

*And* in case the defendants Sturgis and Hall, as such assignees, shall redeem the plaintiffs or the defendants Edmonds, Painton and Hall,

Subsequent accounts in respect of the 300*l.* security:

*Compute* subsequent interest on what they or one of them shall have so paid to the plaintiffs or to the defendants Edmonds, Painton and Hall, or such of them as may have redeemed, in respect of the said security for 300*l.*, and

*Tax* the defendant Sturgis his costs in respect of the said security for 300*l.* And,

And redemption by wife of mortgagor on payment to assignees of amount paid by them on redemption thereof, and subsequent interest and costs of provisional assignee.

*Upon* payment by the defendant Anne Bullock to the defendants Sturgis and Hall, as such assignees as aforesaid, or one of them, what shall be found due to them for what they or he shall have so paid to the plaintiffs or the defendants Edmonds, Painton and Hall, or such of them as may have redeemed in respect of the security for 300*l.* and subsequent interest, and to Sturgis his costs of suit

(a) The reason for this distinction is not apparent.

in respect of the said sum, within three months, &c., *Let* the defendants Sturgis and Hall assign the premises comprised in the security for 300*l.*, free, &c. to the defendant Anne Bullock, &c. *In default*, foreclose her. *Just allowances.*

In default, foreclosure.

**ABSTRACT of Foreclosure Decree in favour of the Assignee of a Mortgage of several Estates, of the Equity of Redemption of one of which she is Purchaser, and for Specific Performance of Agreement for Purchase of the latter Estate against the Representative of the Mortgagor.** 1794.

SOBER v. KEMP (a).

Plaintiff, mortgagee by assignment of estates W. X. and Y. with agreement for the purchase of the equity of redemption of W. K. devisee and legal personal representative of mortgagor and vendor.

B. mortgagee of later date of estates X. Y. and Z.

L. mortgagee after B. of same.

**DECREE.**—*Declare* that the agreement for the sale of W. ought to be specifically performed and carried into execution, and decree the same accordingly. *Let* K., as devisee and legal personal representative of testator, convey W. to the plaintiff, or as she shall direct.

*Account* of what is due to plaintiff for principal and interest, and tax her costs. *And* upon payment by B. of what shall be so due, *Let* the plaintiff assign the premises comprised in her said mortgage, *other than* W., free from all incumbrances. *And* deliver up deeds, &c. *In default*, foreclose B.

*Like* directions as to L. and K. successively.

*In case* B. shall redeem, account of what is due to him, and upon payment by L.,

*Let* B. assign the premises comprised in his mortgage, and in the mortgage to the plaintiff *other than* W., free from incumbrances, and deliver deeds, &c. to L. *In default*, foreclose L.

*And* like process as to K.

*If* L. should redeem, account of what is due to him, and directions for redemption by, or foreclosure of, K.

(a) 6 Hare, 160, note.

## HUGHES v. WILLIAMS. See 3 Mac. &amp; G. 683.

- 1796.** A. seised of estates 1, 2, 3, 4, subject to a legacy of 800*l.* payable to B. afterwards the wife of Z.  
 1818.—A. mortgages 1 and 4 to C.  
 1822.—A. settles 1, 3 and 4, making himself tenant for life, and X. tenant in tail in remainder, and covenanting against incumbrances by himself or his ancestors.  
 1823.—A. leases part of 1 to T.  
 1836.—A. mortgages 2 to D.  
 1843.—E. becomes registered judgment-creditor, with agreement for a legal mortgage of T.'s lease (a).  
 1844.—A. becomes insolvent and F. his assignee.  
 On Bill by E.

DECREE by Wigram, V.-C., April, 1848.

*Account* of what is due to B. for principal and interest from the end of a year from testator's death (1796); and of what is due to C. and D.

On payment by E. to B., C. and D., *Let* them convey; *And* in default, dismiss the bill. *But* in case of redemption by E.,

*If* F. shall pay E. what she shall have paid to B., C. and D. and her own debt;

*Let* E. convey to F.

*In* default, foreclose F. *And* in case of such foreclosure, and of payment of such sum to E. by X., *Let* E. convey to X. *In* default, foreclose X.

Per Lord Truro, C., on appeal.

*First*, it is wrong to foreclose X. upon non-payment to B. and C.; because, though theirs are good charges on the inheritance, and prior to the settlement, yet as A. covenanted against incumbrances by himself or his ancestors, the settled estates are exonerated from incumbrances as between A. and X., who is a purchaser for valuable consideration under the settlement. Then E., the plaintiff, is subject to the same equities as A., and is not in the situation of a purchaser for valuable consideration without notice; and cannot compel X. to pay off incumbrances, against which A. covenanted by the settlement. As between A., or the plaintiff claiming under him, and X., the effect of the covenant in the settlement is to throw the incumbrances prior to the settlement on estate 2; or on the life estate only of A. in the settled estates 1, 3 and 4. (*Averall v. Wade*, L.L. & Goo. t. Sugd. 252.)

*Secondly*, as to the foreclosure of X., on non-payment of the amount due to D.

(a) There were subsequent incumbrancers intervening between E. and F., as appears by the decree on appeal.

D.'s mortgage only comprises estate 2, which is not in settlement, and in which X. has no interest. The decree is therefore wrong in this also.

*Thirdly*, the judgment-debt being the debt of A., and subsequent to the settlement, cannot affect X., against whom the bill should be dismissed. Therefore,

*Dismiss* the bill as against X., with costs to be taxed and paid by the plaintiff.

*Account* of what is due to Z. and B. his wife, in right of B., for principal and interest on her legacy of 800*l.*—interest to be at 4*l.* per cent. for six years prior to the filing of the bill, or at the rate directed by the will—and tax their costs.

*Account* of what is due to C. and D. for principal and interest. D. accounting for rents and profits received by him, and tax their costs.

*Upon* the plaintiff paying to Z. and B. his wife the amount of principal, interest and costs due to her, and paying to C. and D. their principal, interest and costs, within six months, &c.,

*Let* Z. and B., C. and D., respectively assign and convey. *In* default, dismiss bill with costs to be paid by plaintiff.

*But* in case plaintiff shall redeem them, compute subsequent interest upon what plaintiff shall pay, and take account of what is due to plaintiff for principal and interest upon her judgment-debt, and tax her costs;

*And* upon payment by subsequent incumbrancers to plaintiff, of what she shall pay to Z. and B. his wife, C. and D., for principal, interest, costs and subsequent interest, and also plaintiff's principal, interest and costs, within three months, &c.,

*Let* the plaintiff release and convey, &c.

*In* default of payment by subsequent incumbrancers, foreclose them and

*Compute* subsequent interest upon plaintiff's payments, and upon what is found due to her, and tax her further costs.

*And* upon payment by F. to plaintiff of what she shall have paid to Z. and B. his wife, C. and D., with subsequent interest, and what is due to herself as aforesaid, within three months, &c.,

*Let* plaintiff convey to F. *In* default, foreclose him.

*In* case of redemption by subsequent incumbrancers, *Compute* subsequent interest upon what they shall pay, and take account of what is due to them on their judgment-debt, and for their lien secured by deposit of title deeds, deducting rents received by them, and tax

their costs; *And* upon payment to them by F. of the total amount due, within three months, &c., *Let* them release and convey to F. *In* default, foreclose F. *Usual* directions. Liberty to apply.

CHAPPELL *v.* REES. *See* 1 *De G., M. & G.* 393.

**1796.** A. seised of estates 1, 2, 3, 4, subject to a legacy of 800*l.* payable to B.

Mortgages 1, 3, 4.

Settles same upon himself for life, remainder to first (X.), and other sons in tail, and covenants against incumbrances.

Mortgages 2.

Becomes insolvent; and F. appointed assignee. On bill by F. seeking an account of incumbrances, that the priorities, and the extent to which the rights of X. are subject to incumbrances, might be ascertained, and for a sale and division; or that the plaintiff may redeem if necessary, and the estate of X. be made liable as far as is proper.

DECREE by Wigram, V.-C.

*Calculate* interest on the legacy for one year after the testator's death (a) (1795).

*Account* of what is due to the several incumbrancers.

*And* on the plaintiff and defendant X. paying to the said defendants (the incumbrancers) respectively what shall be found due to them respectively for principal, interest and costs, within six months, &c., at such time and place, &c., the said defendants, the incumbrancers, are to release and convey the said estates respectively comprised in their several mortgages and incumbrances, and according to the respective interests of the several parties, free and clear, &c., that is to say,

*As* to the estate 2 (unsettled), to the plaintiff, and the defendant X., or to such of them as shall so redeem the same;

*And* as to the other three estates, 1, 3, 4 (settled), upon the trusts of the settlement dated, &c., in the pleadings mentioned (delivery of deeds, &c.)

*But* in default of the plaintiff and X., or either of them, redeeming the said mortgaged premises within the time aforesaid,

*Dismiss* the plaintiff's bill with costs to be taxed, and to be paid by the plaintiff.

*Usual* directions.

(a) Per Lord St. Leonards on appeal. The decree is right except as to the part which relates to the allowance of interest upon the legacy for a period beyond six years from the filing of the bill.



ALDWORTH v. ROBINSON, 1840. *Reg. Lib. A.*, 1839,  
fo. 874; and see 2 *Beav.* 287.

1826.—Grove End Farm (A.) mortgaged by Lindsey and another, and estate (B.) mortgaged by Robinson to plaintiff to secure 6,000*l.* and interest advanced to Robinson.

1826.—Grove End Farm (A.) also mortgaged to plaintiff to secure 5,000*l.* and interest, advanced to Lindsey.

1828.—September and October. Further charges on both estates to secure 500*l.* and interest advanced to Robinson.

It seems that Lindsey devised part of his mortgaged estate (A.) to Lydia Elizabeth Robinson in fee, and other part for life, with remainder to Robinson the mortgagor, and devised to him the other part, subject to incumbrances mentioned in the will.

DECREE.—The defendant Maria Ainge disclaiming by answer all interest in the mortgaged premises; *Dismiss* the bill as against her with costs, such costs, when taxed, to be paid by the plaintiff and added to his costs.

Dismissal of dis-  
claiming defen-  
dant.

*Account* of what is due to the plaintiff for principal and interest in respect of the several mortgaged debts of 6,000*l.* and 500*l.*, secured to him by the first-mentioned indentures of 1826, and by the further charges of 1828. And a like account of what is due for principal and interest in respect of the mortgage debt of 5,000*l.*, secured by the *secondly* mentioned indentures of 1826, and tax the plaintiff his costs.

Accounts.

*Let* the said costs when taxed, and the costs hereinbefore directed to be paid to the defendant Maria Ainge, be apportioned between the said debt of 5,000*l.* and the total amount of the debts of 6,000*l.* and 500*l.* (*viz.* 6,500*l.*), according to the amounts of the said principal sums.

Costs.  
Apportionment  
of.

*And* upon the defendants Robinson and L. E. Robinson, or either of them, paying to the plaintiff the amount due in respect of the whole of the said principal monies, interest and costs;

On payment by  
mortgagor and  
devisee of surety,  
or either of them,  
of all:

*Or* if the defendant Robinson shall pay to the plaintiff what, upon taking the said accounts, shall be found due to him in respect of the several debts of 6,000*l.* and 500*l.* with the apportioned costs in respect of those debts, such payments to be made within, &c.;

Or on payment  
by mortgagor of  
debts secured on  
both estates;

*Let* the plaintiff convey as follows, *viz.*:—

*If* the defendant Robinson shall pay the whole of the said principal, interest and costs, *Let* the plaintiff convey unto and to the use of the defendant L. E. Robinson, her heirs, and assigns, or as she or they shall appoint, the premises comprised in the *secondly* mentioned indenture of 1826, and devised to her by the will of the said J. Lindsey.

Convey A. to the  
several devisees  
thereof,

*And* also convey to her and her assigns for her life, with remainders

over, and subject as in the said will mentioned, all such part of the mortgaged hereditaments comprised in the last-mentioned indenture as are so devised to her.

*And* convey unto and to the use of the defendant Robinson, his heirs and assigns, or as he or they shall appoint, subject nevertheless and with such powers as in the said will mentioned, all other the hereditaments comprised in the last-mentioned indenture, and devised by the said will to the defendant Robinson in fee, subject as in the said will is mentioned.

and B. to mortgagor.

*And* convey to him, his heirs and assigns, or, &c., the hereditaments comprised in the said indenture of 1826 *first* mentioned. All the said estates to be conveyed free from incumbrances by, &c.

*And* the plaintiff to deliver upon oath to the defendant L. E. Robinson, or, &c., all deeds, &c. solely or principally relating to the premises to be conveyed to her, pursuant to the directions hereinbefore contained. *And* (like form as to defendant Robinson).

If mortgagor shall pay debt secured by both estates, and the other devisee of A. that secured by A. only,

*But* if the defendant Robinson shall pay what shall be due in respect of the said mortgage debts of 6,000*l.* and 500*l.*, and the costs apportioned in respect of those debts: *And* the defendant L. E. Robinson shall pay what shall be found due in respect of the said mortgage debt of 5,000*l.*, and the costs apportioned in respect thereof:

Convey B. to the mortgagor,

*Let* the plaintiff convey unto and to the use of the defendant Robinson, his heirs, &c., the hereditaments comprised in the *first* stated indenture of 1826, free, &c., and deliver upon oath, &c.

and A. to the other devisee thereof, subject, &c.

*And* convey unto and to the use of the defendant L. E. Robinson, or as she or they shall appoint, the hereditaments comprised in the *secondly* stated indenture of 1826, subject nevertheless to such powers and charges contained in the will of the said J. Lindsey, or such of them as shall be subsisting unsatisfied; such conveyances to be made free, &c., and the plaintiff to deliver up, &c.

If mortgagor shall pay debt secured by both, but neither defendant shall pay that secured by A. only,

*If* the defendant Robinson shall pay the plaintiff what shall be found due in respect of the 6,000*l.* and 500*l.*, and the costs apportioned in respect thereof: But the defendants Robinson and L. E. Robinson shall not, nor shall either of them, pay what shall be due in respect of the 5,000*l.*, and the costs apportioned in respect thereof:

Convey B. to the mortgagor,

*Let* the plaintiff convey to the use of the defendant Robinson, his heirs and assigns, or, &c., the hereditaments comprised in the indenture of 1826, *first* stated, free from incumbrances, and deliver, &c.

and foreclose him and the other devisees of A. as to A.

*And* in such last-mentioned case let the defendants Robinson and L. E. Robinson stand foreclosed of all right and equity of redemption in the hereditaments comprised in the *secondly* stated indenture of 1826.

If the other devisee of A. shall pay all,

*And* if the defendant L. E. Robinson shall pay the whole of the said principal money and interest, and costs,

*Let* the plaintiff convey unto and to the use of her, her heirs and assigns, or &c., all the before-mentioned hereditaments, as well those comprised in the *secondly* stated as in the *first* stated indenture of 1826, but as to the hereditaments devised by the will of the said J. Lindsey, subject to the said powers and charges therein contained, or such of them as shall be then subsisting and unsatisfied, free, &c., and the plaintiff to deliver, &c.

Convey both estates to her, subject, &c.

*And* in that case compute subsequent interest upon what the defendant L. E. Robinson shall so pay to the plaintiff for principal, interest and costs as aforesaid. And upon the defendant Robinson paying to the defendant L. E. Robinson what she shall so pay to the plaintiff with such interest thereon as aforesaid within three months, &c.,

And compute subsequent interest, &c.

And upon payment to her by mortgagor,

*Let* the defendant L. E. Robinson convey to the defendant Robinson, his heirs and assigns, or, &c., the hereditaments comprised in the indenture of 1826, *first* stated, and all the hereditaments comprised in the indenture of 1826, *secondly* stated, and by the will of J. Lindsey devised to the said Robinson, subject nevertheless, as to the hereditaments devised by the said will to the defendant L. E. Robinson for her life, to her life interest therein, and subject, as to all the said hereditaments, to such powers and charges as by the said will were made or given, or which may be still subsisting unsatisfied. *And* deliver all deeds, &c., solely or principally relating to the hereditaments hereinbefore directed to be conveyed, to the defendant Robinson.

Let her convey to him B.

and so much of A. as was devised to him, subject as to part to her life-interest therein.

*But* in default of the defendant Robinson so paying to the defendant L. E. Robinson such principal, interests and costs, *Let* the defendant Robinson be absolutely foreclosed, &c.

In default, foreclose mortgagor,

*And* in default of the defendants Robinson and L. E. Robinson, or either of them, making such payments, &c., *Let* them both stand absolutely foreclosed, &c.

Upon non-payment by either, foreclose both.

*Usual* directions. Liberty to apply.

## OF SECURITIES UNDER VARIOUS STATUTES.

1798.

### *Of Securities upon Ecclesiastical Benefices.*

Power to incumbents to borrow money for repairs, buildings, purchase of land and improvements.

By the statute commonly called "Gilbert's Act," and the several acts by which it has been amended and extended, incumbents of ecclesiastical benefices (and, in certain cases, the ordinary) are empowered to borrow at interest, under the regulations of the acts, the estimated amount of the necessary outlay, not exceeding three years' net income of the living, after deducting outgoings, of building or repairing the parsonage house and offices, or of purchasing lands, not exceeding twelve acres, contiguous to or desirable to be used or occupied with the parsonage house or glebe belonging to such benefice, or for the purpose of building any offices, stables or outbuildings or fences necessary for the occupation or protection of such parsonage, or for the purpose of restoring, rebuilding or repairing the fabric of the chancel of the church (where the incumbent is liable to sustain it), or for building, improving, enlarging or purchasing any farmhouse or farm buildings, or labourers' dwellings, with the appurtenances, belonging to or desirable to be acquired for any farm or lands appertaining to such benefice.

Mode of applying loans.

Loan secured on profits of benefice.

The monies borrowed are to be paid into the hands of a person or persons appointed in writing by the ordinary, patron and incumbent, the nominee giving a bond to the ordinary for its due application, and the nominee's receipt is a good discharge to the lender of the money. The nominee makes and sees to the execution of the contracts for the works, and pays for them and accounts for the expenditure; and the surplus, if any, is applied, at the discretion of the ordinary and of the patron and incumbent, or of one of them with the ordinary, in further lasting improvements in buildings on the glebe, or in part discharge of the principal of the debt; which may be secured on mortgage (of which a counterpart is to be executed, and which is to be registered in the registry of the diocese) of the glebe, tithes, rent-charges, rents and other profits of the benefice, for thirty-five years, or till payment of the loan with interest and costs; one-thirtieth of the principal being repaid annually after the first year, with the interest on the unpaid principal (a); for the recovery

(a) 17 Geo. 3, c. 53, ss. 1, 2, 4, 6, 8; 1 & 2 Vict. c. 23, ss. 1, 2; 28 & 29 Vict. c. 69, s. 1; and see 5 & 6

Vict. c. 26, s. 13. As to apportionment of annual payment in case of avoidance, see 17 Geo. 3, c. 53, s. 7.

of which powers of distress and sale are given to the mortgagee when principal and interest are in arrear for 40 days, and a power of sequestration, having preference over all other sequestrations, except such as were founded upon judgments duly signed and docketed at the passing of the act, is vested in the ordinary, for recovery of principal and interest, and, in case of the neglect of the incumbent, to insure the building (*b*).

Powers of distress, sale and sequestration.

Loans may be made under the acts by the Governors of Queen Anne's Bounty without interest, where the annual value of the benefice does not exceed 50*l*. (*c*).

Colleges and halls of the Universities of Oxford and Cambridge, or other corporate bodies, may lend money for the purposes of the acts without interest, where the benefice for which the loan is raised is under their patronage (*d*).

Power to colleges and other incorporated patrons to lend.

Patrons of livings, who may be minors, idiots, lunatics or under coverture, may be bound by the acts of their guardians, committees or husbands (*e*).

Gilbert's Act enables incumbents to borrow money for the purpose of adding to (*f*), as well as of repairing or building a parsonage; and the mortgage is good though the money be advanced by the incumbent himself at a moderate rate of interest (*g*). But it may not be advanced by a person whose duty it is to see that the provisions of the act are properly carried out for the benefit of the living (*h*).

Objects of loan.

## 1799.

By another act (*i*) powers are given to the incumbents of ecclesiastical benefices to purchase additional land for glebe; and for that purpose to make limited mortgages of the profits of the benefice.

Mortgages for purchase of glebe.

## 1800.

By the Benefices Plurality Act (*k*), upon or at any time after the avoidance of any benefice, the bishop is to issue a commission to four beneficed clergymen of his diocese, or if the diocese be within his peculiar jurisdiction, but locally situate in another diocese, to four beneficed clergymen of such diocese, one of whom shall be rural dean (if there be any), directing them to inquire whether there is a fit house of residence within the benefice, and what are its annual profits, and if they exceed 100*l*., whether a fit house can be provided on the glebe or otherwise.

Bishop to direct inquiry as to residence.

(*b*) 17 Geo. 3, c. 53, ss. 3, 6; 1 & 2 Vict. c. 23, s. 15.

(*c*) 17 Geo. 3, c. 53, s. 12; 1 & 2 Vict. c. 23, s. 4.

(*d*) 17 Geo. 3, c. 53, s. 13; 1 & 2 Vict. c. 23, s. 5.

(*e*) 17 Geo. 3, c. 53, s. 14.

(*f*) *Boyd v. Barker*, 4 Dr. 582; 5 Jur., N. S. 234.

(*g*) *Id.*

(*h*) *Greenlaw v. King*, 3 Beav. 49; 4 Jur. 622; 5 Jur. 18.

(*i*) 55 Geo. 3, c. 147, ss. 6, 7.

(*k*) 1 & 2 Vict. c. 106; and see 5 & 6 Vict. c. 26, s. 13.

May raise money  
by mortgage of  
glebe and profits  
of benefice.

In case it be reported in writing by the commissioners, or any three of them, that there is no fit house of residence within the benefice, that the annual profits exceed 100%, and that a fit house can conveniently be provided on the glebe, or on land which can be conveniently procured, the bishop is to obtain an estimate of the cost of the work, and thereupon, by a mortgage of the glebe, tithe, rent, rent-charges and other profits, to raise the amount of the estimate (after deducting the value of the saleable materials), not exceeding four years' net produce of the benefice, after deducting outgoings, except the salary of the assistant curate where necessary.

Provisions of  
securities.

The statute also contains provisions as to the length of the term, the liability to payment, the remedies in case of non-payment, and the application of the money raised, corresponding with the provisions of Gilbert's Act (*l*) (1798).

Application of  
monies received  
for dilapidations.

All monies received from representatives of any former incumbent, and not laid out in repairs, are to be applied in part of the payments under the estimate; and all money thereafter to be recovered or received after the completion of and payment for the buildings, is to be applied in payment of the principal of the mortgage debt: or, in case of discharge thereof, shall be paid into the hands of the bishop's nominee, to be expended in additional buildings or improvements upon the glebe, to be approved by the bishop; and in the meantime, or in case such buildings are not necessary, shall be laid out in government or other good securities, and the interest thereof paid to the incumbent for the time being (*m*).

## 1801.

Power to new in-  
cumbents to bor-  
row for repairs.

By the Ecclesiastical Dilapidations Act, 1871 (*n*) (for providing for repairs to buildings which ecclesiastical persons are bound to keep in repair), the new incumbent of a benefice may borrow, and the governors of Queen Anne's Bounty may lend upon the request and with the consent of the bishop and patron, upon the security of the possessions of the benefice (1) the whole or any part of the cost of the repairs of the buildings of the benefice stated in the order to be made under the act by the bishop; (2) such sum as the governors shall think fit in respect of costs and expenses.

Form of security.

Certificate of pay-  
ment.

Remedies.

The security may be in the form (*o*) contained in the first schedule to the act or in such other form as the governors may approve. The certificate of their treasurer that any sum has been placed to the credit of the account mentioned in the certificate is conclusive evidence of the fact, and the governors have the same remedies for the recovery of the sums due upon the security against the

(*l*) Sects. 62—68.

(*m*) Sect. 69.

(*n*) 34 & 35 Vict. c. 43, s. 38.  
And as to the form and provisions

of the security, see Eccles. Dilap.  
Act, 1872, c. 96.

(*o*) 34 & 35 Vict. c. 43, ss. 62,  
73; Act of 1872, s. 1.

incumbent and his successors, and the property comprised in the security, as if the advance had been made for repairing and rebuilding under the acts 17 Geo. 3, c. 53; 21 Geo. 3, c. 66; 7 Geo. 4, c. 66; 1 & 2 Vict. c. 23; 28 & 29 Vict. c. 69; the powers in which and in any act or acts amending the same are exerciseable either separately or concurrently with the powers of the Act of 1871.

And the receipt of the treasurer is a discharge for all monies paid to the governors under the provisions of the act. Receipt.

Before lending on the security of the possessions of the benefice the governors are (*p*) to require from the incumbent an account in writing signed by him, and verified by his oath or statutory declaration, of the annual profits of the living, and to procure the consent in writing of the bishop and patron under their hands, or, where the patron is a corporation aggregate, under its seal. Incumbent to furnish account of annual profits.

The provisions (*q*) of the several acts just mentioned, and of the acts referring to or amending the same with respect to the registration of mortgages and to the proportioning of payments in the case of death or avoidance, and to stamps and fees of offices and to the priority of sequestrations, apply to securities made under the authority of the act. Registration of securities, &c.

*Of Securities under the Charitable Trusts Acts.*

1802.

By the Charitable Trusts Acts (*r*), the Board of Charity Commissioners may authorize trustees of charity estates to raise any sum of money by mortgage of all or any part of the estates for making the repairs and improvements mentioned in the acts, and ordered by the commissioners, or to any other purpose or object which the board shall consider to be beneficial to the charity or the estate, or the objects thereof, and which shall not be inconsistent with the trusts or intentions of the foundation, with such provisions as to the board may seem necessary, for directing the trustees or administrators of the charity to discharge the principal debt or any part thereof, by such yearly or other instalments, within thirty years from the date of the security, as to the board may seem fit; or to form an accumulation or sinking fund out of the income of the charity, for discharging the principal debt, or any portion thereof, within the same period: and shall give directions as to the investment and accumulation of such fund, which shall be carried into effect by the trustees or administrators of the charity. Charity Commissioners may authorize mortgages of charity estates.

*Of Securities under the Commissioners Clauses Act.*

1803.

By the Commissioners Clauses Act, 1847 (*s*), the object of which is to comprise in one act sundry provisions usually contained in acts of

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|---|---------------------------------------|
| ( <i>p</i> ) Sect. 63.                    | Trusts Amendment Act, 1855, 18 &      |
| ( <i>q</i> ) Sect. 64.                    | 19 Vict. c. 124, s. 30; 23 & 24 Vict. |
| ( <i>r</i> ) Charitable Trusts Act, 1853, | c. 136, s. 15.                        |
| 16 & 17 Vict. c. 137, s. 21; Charitable   | ( <i>s</i> ) 10 Vict. c. 16.          |

parliament authorizing the execution of undertakings of a public nature by bodies of commissioners, trustees, or other persons, not being joint stock companies, and which extends only to such undertakings or commissioners as shall be authorized or constituted by any act of parliament thereafter to be passed, which shall declare that the act shall be incorporated therewith; the term "the commissioners" is defined to mean the commissioners, trustees, undertakers, or other persons or body corporate constituted by the special act, or thereby intrusted with powers for executing the undertaking (t).

**Form of mortgages.**

Every mortgage or assignation in security of rates or other property authorized to be made under the provisions of that or the special act shall be by deed duly stamped, in which the consideration shall be duly stated; and which shall be under the common seal of the commissioners if they be a body corporate, or if they be not a body corporate shall be executed by the commissioners or any five of them, and may be according to the form in the Schedule (B.) to the act annexed or to the like effect; and the respective mortgagees or assignees in security shall be entitled one with another to their respective proportions of the rates and assessments or other property comprised in such mortgages or assignations respectively, according to the respective sums in such mortgages or assignations mentioned to be advanced by such mortgagees or assignees respectively, and to be repaid the sums so advanced, with interest, without any preference one above another by reason of the priority of advancing such monies, or of the dates of any such mortgages or assignations respectively (u).

**Register of mortgages to be kept, and to be open to inspection.**

A register of mortgages or assignations in security shall be kept by the clerk to the commissioners, and where by the special act the commissioners are authorized or required to raise separate sums on separate rates or other property, a separate register shall be kept for each class of mortgages or assignations in security, and within fourteen days after the date of any mortgage or assignation in security an entry or memorial of the number and date thereof, and of the names of the parties thereto, with their proper additions, shall be made in the proper register; and every such register may be perused at all reasonable times by any person interested in any such mortgage or assignation in security without fee or reward (x).

**Transfers of mortgages.**

Any person entitled to any such mortgage or assignation may transfer his right and interest therein; and every such transfer shall be by deed duly stamped, wherein the consideration shall be truly stated; and may be according to the form in the Schedule (C.) to the act annexed, or to the like effect (y).

(t) Sects. 1, 2.  
(u) Sect. 75.

(x) Sect. 76.  
(y) Sect. 77.



Within thirty days after the date of every such transfer, if executed within the United Kingdom, or otherwise within thirty days after the arrival thereof in the United Kingdom, it shall be produced to the clerk to the commissioners, and thereupon he shall cause an entry or memorial thereof to be made, in the same manner as in the case of the original mortgage or assignation in security; and after such entry every such transfer shall entitle the transferee, his executors, administrators or assigns, to the full benefit of the original mortgage or assignation in security, and the principal and interest thereby secured; and such transferee may in like manner assign or transfer the same again, *toties quoties*; and it shall not be in the power of any person, except the person to whom the same shall have been last transferred, his executors, administrators or assigns, to make void, release or discharge the mortgage or assignation so transferred, or any money thereby secured (z).

Register of transfers to be kept.

Unless otherwise provided by any mortgage or assignation in security, the interest of the money borrowed shall be paid half-yearly (a).

Interest on mortgages to be paid half-yearly.

If the commissioners can at any time borrow at a lower rate of interest than any securities given by them shall bear, they may do so in order to pay off the securities bearing such higher rate of interest, and may charge the rates and other property which they may be authorized to mortgage or assign in security, or any part thereof, with payment of such sum and such lower rate of interest, in such manner and subject to such regulations as are therein contained with respect to other moneys borrowed on mortgage or assignation in security (b).

Power to borrow money at a lower rate of interest to pay off securities at a higher rate.

The commissioners may fix a period for the repayment of all principal monies borrowed, with interest, and in such case shall cause such period to be inserted in the security; and upon the expiration of such period the principal sum, with the arrears of interest, shall, on demand, be paid to the party entitled to receive such principal and interest, and if no other place of payment be inserted in such deed such principal and interest shall be payable at the office of the commissioners (c).

Repayment of money borrowed at a time and place agreed upon.

If no time be fixed in the security for the repayment of the money, the party entitled to receive it may, at the expiration of twelve months from the date of such deed, or at any time after, demand payment of the principal money, with all arrears of interest, upon giving six months' previous notice for that purpose, and in the like case the commissioners may at any time pay off the money borrowed, on giving the like notice; and every such notice shall be in writing,

Repayment of money borrowed when no time or place has been agreed upon.

(z) Sect. 78.  
(a) Sect. 79.

(b) Sect. 80.  
(c) Sect. 81.

or print, or both, and if given by a mortgagee or creditor shall be delivered to the clerk or left at the office of the commissioners; and if given by the commissioners shall be given either personally to such mortgagee or creditor, or left at his residence, or if such mortgagee or creditor be unknown to the commissioners, or cannot be found after diligent inquiry, such notice shall be given by advertisement in the London Gazette if the office of the commissioners is in England, the Edinburgh Gazette if it is in Scotland, or in the Dublin Gazette if it is in Ireland (*d*).

Interest to cease on expiration of notice to pay off a mortgage debt.

If the commissioners shall have given notice of their intention to pay off any such security at a time when the same may lawfully be paid off by them, then at the expiration of such notice all further interest shall cease to be payable, unless, on demand of payment made pursuant to such notice, or at any time thereafter, the commissioners fail to pay the principal and interest due at the expiration of such notice (*e*).

Monies borrowed on security of rates to be paid off in a limited period.

In order to discharge the principal money borrowed as aforesaid on security of any of the rates, the commissioners shall every year appropriate and set apart out of such rates a sum equal to the prescribed part, and if no part be prescribed one-twentieth part of the sums so borrowed respectively, as a sinking fund to be applied in paying off the respective principal monies so borrowed, and shall from time to time cause such sinking fund to be invested in the purchase of exchequer bills or other government securities, or in Scotland deposited in one of the banks there incorporated by act of parliament or royal charter, and to be increased by accumulation in the way of compound interest or otherwise, until the same respectively shall be of sufficient amount to pay off the principal debts to which such sinking fund shall be applicable, or some part thereof, which the commissioners shall think ought then to be paid off, at which time the same shall be so applied in paying off the same in manner in the act mentioned (*f*).

Mode of paying off mortgages.

Whenever the commissioners shall be enabled to pay off one or more of the securities which shall be then payable and shall not be able to pay off the whole of the same class, they shall decide the order in which they shall be paid off by lot among the class to which such one or more of the mortgages or assignments in security belong, and shall cause a notice, signed by their clerk, to be given to the persons entitled to the money to be paid off, pursuant to such lot, and such notice shall express the principal sum proposed to be paid off, and that the same will be paid, together with the interest due thereon, at a place to be specified, at the expiration of six months from the date of giving such notice (*g*).

(*d*) Sect. 82.

(*e*) Sect. 83.

(*f*) Sect. 84.

(*g*) Sect. 85.

Where by the special act the mortgagees or assignees in security are empowered to enforce the payment of the arrears of interest, or of principal and interest, by the appointment of a receiver, then if, within thirty days after the interest accruing upon any such security has become payable, and after demand thereof in writing, the same be not paid, the mortgagee or assignee in security may, without prejudice to his right to sue for the interest so in arrear in any of the superior courts, require the appointment of a receiver; and if within six months after the principal money owing upon any such mortgage or assignation in security has become payable, and after demand thereof in writing, the same be not paid, together with all interest, the mortgagee or assignee in security, without prejudice to his right to sue for such principal money, with all arrears of interest, in any of the superior courts, may, if his debt amount to the prescribed sum, alone, or, if his debt do not amount to the prescribed sum, he may in conjunction with other mortgagees or assignees in security whose debts being so in arrear, together with his, amount to the prescribed sum, after demand as aforesaid, require the appointment of a receiver (*h*).

Arrears of interest, when to be enforced by appointment of a receiver.

Arrears of principal and interest.

Every application for a receiver shall in England or Ireland be made to two justices, and in Scotland to the sheriff, and on any such application such justices or sheriff may, by order in writing, after hearing the parties, appoint some person to receive the whole or a competent part of the rates or sums liable to the payment of such interest, or such principal and interest, as the case may be, until such interest or such principal and interest, together with all costs, including the charges of receiving the rates or sums aforesaid, be fully paid; and upon such appointment being made, all such rates and sums of money as aforesaid, or such part thereof as may be ordered by the said justices or sheriff, shall be paid to the persons so to be appointed, and the money so paid shall be so much money received by or to the use of the party to whom such interest or such principal and interest, as the case may be, shall be then due, and on whose behalf such receiver shall have been appointed, and after such interest and costs, or such principal, interest and costs, have been so received, the power of such receiver shall cease (*i*).

As to the appointment of a receiver.

The books of account of the commissioners shall be open at all seasonable times to the inspection of the respective mortgagees or assignees in security of the commissioners, with liberty to take extracts therefrom, without fee or reward (*k*).

Account books to be open to the inspection of mortgagees.

#### *Of Statutory Securities by Joint Stock Companies.*

By the Companies Clauses Consolidation Act, 1845, joint stock companies authorized by their special acts to borrow money on

1804.

Power to borrow on mortgage.

(*h*) Sect. 86.  
(*i*) Sect. 87.

(*k*) Sect. 88.

mortgage or bond may (*l*), subject to the restrictions contained in the special act, borrow such sums as shall from time to time by an order of a general meeting of the company be authorized to be borrowed, not exceeding in the whole the sum prescribed by the special act, and may secure the repayment with interest, by a mortgage of the undertaking and the future calls on the shareholders, or by bonds (but not so as to preclude the application of the calls to the purposes of the company (*m*)) without express provision). And on discharge of any part of the money borrowed may (*n*) again, from time to time, borrow the amount paid off, upon obtaining the authority of a general meeting of the company in cases where the money is not re-borrowed in order to pay off any existing mortgage or bond.

Evidence of right to borrow.

Where (*o*) by the special act the company shall be restricted from borrowing on mortgage or bond until a definite portion of their capital shall be subscribed or paid up, or where the authority of a general meeting is required for such borrowing, the certificate of a justice that such definite portion of the capital has been subscribed or paid up, and a copy of the order of a general meeting of the company authorizing the borrowing of any money certified by one of the directors or by the secretary to be a true copy, shall be sufficient evidence of the subscription or payment of such capital, and of the making of the order for borrowing; and upon production to any justice of the books of the company, and of such other evidence as he shall think sufficient, such justice shall grant the certificate aforesaid (388).

Form of mortgage.

Every mortgage and bond for securing money borrowed by the company shall be by deed (*p*) under the common seal of the company, duly stamped, and wherein the consideration shall be truly stated, and may be according to the form given in the schedule, or to the like effect.

Mortgagees entitled without preference.

The respective mortgagees are entitled, one with another, to their respective proportions of the tolls, sums and premises comprised in the mortgages, and of the future calls, if comprised therein, according to the respective sums in such mortgages mentioned to be advanced, and to be repaid the sums so advanced, with interest, without any preference one above another, by reason of the priority of the date of any such mortgage, or of the meeting at which it was authorized (*q*). And a like provision is made for the payment, without preference, of the obligees of the bonds (*r*).

(*l*) 8 & 9 Vict. c. 16, s. 38.

(*m*) Sect. 43.

(*n*) Sect. 39.

(*o*) Sect. 40. See *Fountain v. Carmarthen Railway Co.*, L. R., 5 Eq. 316.

(*p*) Sect. 41.

(*q*) Sect. 42.

(*r*) Sect. 44. See *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 125.

Within fourteen days after the date of any mortgage or bond, the number and date thereof, and the sums secured thereby, and the names of the parties thereto, with their proper additions, are to be entered in a register kept by the secretary of the company, and which is to be open to the perusal of the shareholders or bond creditors, or of any person interested in any such mortgage or bond (s).

Registration of mortgages.

By the Companies Act, 1862 (t), every limited company under the act is required (under a penalty of 50*l.* against any director, manager or other officer of the company who knowingly authorizes or permits the omission) to keep a register of all mortgages and charges specially affecting property of the company, and to enter into such register in respect of each mortgage or charge, a short description of the property mortgaged or charged, the amount of charge created, and the names of the mortgagees or persons entitled to such charge. The register is to be open to inspection by any creditor or member of the company at all reasonable times, the right being enforceable both by a penalty in case of refusal, and also, as respects companies registered in England and Ireland, by the order of any judge sitting in chambers, or of the Vice-Warden of the Stannaries in the case of companies subject to his jurisdiction.

1805.

Registration under Act of 1862.

Any such mortgage or other act relating to property, as would if made or done by or against any individual trader, be deemed in the event of his bankruptcy to have been made or done by way of undue or fraudulent preference of the creditors of such trader, shall, if made or done by or against any company, be deemed, in the event of such company being wound up under the act, to have been made or done by way of undue or fraudulent preference of the creditors of such company, and shall be invalid accordingly; and the presentation of a petition and a resolution for winding up a company, respectively correspond with the act of bankruptcy in the case of an individual trader (u) (328).

By another statute (x), which recited that many railway companies had borrowed money in an unauthorized manner, upon the security of loan notes, or other instruments purporting to give a security for repayment of principal sums borrowed at certain dates, and for payment of interest thereon in the meantime, a penalty was enacted equal to the amount purporting to be secured by any loan note or other negotiable or assignable instrument, thenceforth issued by any railway company, purporting to bind the company as a legal security for money advanced to them otherwise than under the provisions of

1806.

Penalty for unauthorized mortgages by railway companies.

(s) Sect. 45.  
(t) 25 & 26 Vict. c. 89, s. 43.  
See *The Queen v. The General Cemetery Co.*, 6 E. & B. 415.  
(u) Id. s. 164. See *Gaslight, &c.*

*Co. v. Terrell*, 10 Eq. 168; *European Central Railway Co.*, L. R., 13 Eq. 255.  
(x) 7 & 8 Vict. c. 85, s. 19.

an act or acts of parliament, authorizing the company to raise such money and to issue such security. But it was provided that any company might renew any such loan note or other instrument issued by them prior to the passing of the act, for any period not exceeding five years from that time.

By this act the borrowing of money by railway companies otherwise than in conformity with the terms of their special act is impliedly forbidden (*y*).

Transfers of mortgages and registration thereof.

Any person entitled to any mortgage or bond executed in pursuance of the Companies Clauses Act, may, from time to time, transfer his interest therein by deed duly stamped, which may be in the form given in the schedule, and in which the consideration is to be truly stated (*z*). And within thirty days after the date of every such transfer, if executed within the United Kingdom, or otherwise within thirty days after the arrival thereof in the United Kingdom, it shall be produced to the secretary, who shall cause an entry of it to be made in the same manner as the original mortgage [or bond]; and after such entry every such transfer shall entitle the transferee to the full benefit of the original mortgage or bond, in all respects; and no transferor, after transfer, shall have power to make void, release or discharge the mortgage or bond so transferred, or any money thereby secured; and until such entry, the company shall not be responsible to the transferee in respect of such mortgage [or bond] (*a*).

Payment of interest.

The interest of the money borrowed upon any such mortgage or bond shall be paid at the periods appointed in such mortgage or bond; and if no periods be appointed, half-yearly, to the several parties entitled thereto, and in preference to any dividends payable to the shareholders of the company (*b*).

Transfer of interest.

The interest on any such mortgage or bond shall not be transferable except by deed duly stamped (*c*).

Repayment of principal and interest.

The company may fix a period for the repayment of the principal money borrowed, with the interest, and in such case shall cause such period to be inserted in the mortgage deed or bond; and upon the expiration of such period the principal sum, together with the arrears of interest thereon, shall, on demand, be paid to the party entitled to such mortgage or bond; and if no other place of payment be inserted in such mortgage deed or bond, such principal and interest shall be payable at the principal office or place of business of the company (*d*).

(*y*) *Chambers v. Manchester and Milford Railway Co.*, 10 Jur., N. S. 700.

(*z*) 8 & 9 Vict. c. 16, s. 46.

(*a*) Sect. 47.

(*b*) Sect. 48.

(*c*) Sect. 49.

(*d*) Sect. 50.

If no time be fixed in the mortgage deed or bond for the repayment of the money borrowed, the party entitled to the mortgage or bond may at, or at any time after, the expiration of twelve months from the date of such mortgage or bond demand payment of the principal money with all arrears of interest upon giving six months' previous notice for that purpose, and in the like case the company may at any time pay off the money borrowed on giving the like notice, and every such notice shall be in writing or print, or both; and if given by a mortgagee or bond creditor shall be delivered to the secretary or left at the principal office of the company; and if given by the company shall be given either personally to the mortgagee or bond creditor, or left at his residence; or if such mortgagee or bond creditor be unknown to the directors, or cannot be found after diligent inquiry, such notice shall be given by advertisement in the London or Dublin Gazette, according as the principal office of the company shall be in England or Ireland, or in some newspaper, as thereafter mentioned (e).

Where no time fixed.

If the company shall have given notice of their intention to pay off any such mortgage or bond, at a time when the same may lawfully be paid off by them, then at the expiration of such notice all further interest shall cease to be payable, unless on demand of payment made pursuant to such notice, or at any time thereafter, the company shall fail to pay the principal and interest due at the expiration of such notice (f).

Cesser of interest.

Where by the special act the mortgagees of the company shall be empowered to enforce the payment of the arrears of interest, or of principal and interest due by the appointment of a receiver, then, if within thirty days after the interest accruing upon any such mortgage has become payable, and after demand thereof in writing, the same be not paid, the mortgagee may, without prejudice to his right to sue for the interest so in arrear in any of the superior courts of law or equity, require the appointment of a receiver. And if within six months after the principal money owing upon any such mortgage has become payable, and after demand thereof in writing, the same be not paid, the mortgagee, without prejudice to his right to sue for such principal money, together with all arrears of interest, in any of the superior courts of law or equity, may, if his debt amount to the prescribed sum, alone, or if his debt does not amount to the prescribed sum, in conjunction with other mortgagees, whose debts being so in arrear after demand as aforesaid, shall, together with his, amount to the prescribed sum, require the appointment of a receiver (g).

Appointment of receiver.

Every application for a receiver in the cases aforesaid shall be made to two justices; and on any such application it shall be lawful

Manner of appointing receiver.

(e) Sect. 51: see sect. 138.  
(f) Sect. 52.

(g) Sect. 53.

for such justices by order in writing, after hearing the parties, to appoint some person to receive the whole or a competent part of the tolls or sums liable to the payment of such interest, or such principal and interest, as the case may be, until such interest, or principal and interest, as the case may be, with all costs, including the charges of receiving the tolls or sums aforesaid, be fully paid; and upon such appointment being made, all such tolls and sums of money as aforesaid shall be paid to and received by the person so to be appointed; and the money so to be received shall be so much money received by or to the use of the party to whom such interest, or principal and interest, as the case may be, shall be then due, and on whose behalf such receiver shall have been appointed; and after such interest and costs, or such principal, interest and costs, have been so received, the power of such receiver shall cease (*h*).

Accounts to be open to inspection.

At all seasonable times the books of account of the company shall be open to the inspection of the respective mortgagees and bond creditors thereof, with liberty to take extracts therefrom without fee or reward (*i*).

### 1807.

Power to raise money on debenture stock.

By the Companies Clauses Acts, 1863 and 1869 (*k*), companies which, by any subsequent act, are authorized to create and issue debenture stock, or which have power to raise money on mortgage or bond by any act of parliament, but no power to create and issue debenture stock, are enabled to raise by means of debenture stock at a fixed and perpetual preferential interest payable as the company thinks fit, all or any part of the money which they are authorized to raise by mortgage or bond, but the issue must be authorized by the company according to sect. 22 of the Companies Act, 1863.

Priority of stock.

The stock is made a charge on the undertaking prior to all shares or stock of the company, and is transmissible and transferable like other stock, and has the incidents of personal estate (*l*).

Priority of interest.

The interest has priority over all the dividends or interest on any stock or shares of the company, and ranks next to the interest on mortgages or bonds of the company legally granted before the creation of the stock; but the holders have no preference among themselves (*m*).

Receiver.

If the interest is in arrear for thirty days, provision is made for the appointment of a receiver in England or Ireland, or of a judicial factor in Scotland, who is to receive the rents or tolls liable to the interest, for the use of the persons interested according to their priorities, and is to distribute it rateably and without priority among

(*h*) Sect. 54.

32 & 33 Vict. c. 48, s. 1.

(*i*) Sect. 55.

(*l*) 26 & 27 Vict. c. 118, s. 23.

(*k*) 26 & 27 Vict. c. 118, s. 22;

(*m*) Id. s. 24.



the holders of debenture stock whose interest is in arrear, after providing for the interest on the bonds and mortgages of the company (*n*).

The holders of the stock may also, without prejudice to the right to a receiver, recover their arrears of interest by action against the company (*o*). Power to sue.

The debenture stock is to be registered, and every holder is to have a certificate of the amount of his stock, and the certificates are subject to the general rules relating to certificates of shares in capital (*p*). Stock to be registered.

The debenture stock does not affect mortgages or bonds legally granted before it was created, or the power of the company to raise money on mortgage or bond; and it entitles holders to the rights and powers of mortgagees, except the right to require re-payment of the principal paid up in respect of it (*q*). Saving rights of prior mortgagees, &c.

The money raised is to be applied exclusively in payment of the money due by the company on mortgage or bond, or for the purpose for which it would be payable if raised by mortgage or bond (*r*). Application of money raised.

The company is bound to keep separate accounts of debenture stock; and to the extent of the money borrowed, the powers of borrowing and re-borrowing by the company are extinguished (*s*): but money raised for and applied in the discharge of statutory bonds or mortgages, shall be deemed to be borrowed within, and not in excess of, the statutory powers (*t*). Separate accounts of stock.

The provisions apply to mortgage preference stock and funded debt of the company (*u*). Application of act.

*Of Securities under the Copyhold Enfranchisement Acts.*

1808.

Under the Copyhold Enfranchisement Act (*x*), the rights of the lords of manors may be commuted for a rent-charge and fine certain on death or alienation; and lords and tenants are empowered to effect voluntary enfranchisements. All lands enfranchised under the act are to be held under the same title as that under which they were held at the time of enfranchisement, and not subject to any incumbrances, claims or demands affecting the manor of which they are holden (*y*). Commutation of rights of lords of manors.

Tenants with limited interest, and who shall pay any expenses or costs of enfranchisement, may, with the consent of the copyhold Charges by tenants with limited interest.

(*n*) 26 & 27 Vict. c. 118, ss. 25, 26.

(*o*) Id. s. 27.

(*p*) Id. ss. 28, 29.

(*q*) Id. ss. 30, 31.

(*r*) Id. s. 32.

(*s*) Id. ss. 33, 34.

(*t*) 32 & 33 Vict. c. 48, s. 4.

(*u*) 26 & 27 Vict. c. 118, s. 35.

(*x*) 4 & 5 Vict. c. 35.

(*y*) Sect. 64.

commissioners, and by a simple entry on the court rolls, charge such expenses and costs, with interest at 4*l.* per cent. on the copyholds to which the same relate, but so that the principal charge shall be lessened in every year by one-twentieth of such original charge, and shall be subject to previous mortgages (*z*).

Charges by lords with limited interests or being trustees.

The lord of a manor having a particular interest, or being a trustee, and who shall, in case of commutation, pay any such expenses or costs, may, with the consent of the commissioners, charge such expenses and costs, and the expenses (to be previously approved by the commissioners, or by an assistant-commissioner) of employing agents to protect his interests, or otherwise, with interest at 4*l.* per cent. per annum, on the manor to which the same relate, but so that the principal charge shall be lessened in every year following such charge by one-twentieth of the original charge, and shall be subject to previous mortgages (*a*).

Charges take effect from confirmation of apportionment.

Immediately after the date of the final confirmation of the apportionment, or from the date of the conveyance by which the enfranchisement is effected, the lands shall stand charged with the respective sums mentioned in the apportionment to be payable to the lord and steward, or other officers, with lawful interest from the day mentioned in the apportionment till payment; and until payment, the person or persons for the time being seised of the manor shall be deemed to stand seised as mortgagee in fee thereof, for the benefit of the lords as to the sum payable to them, and of the steward or other officers as to the sums payable to him or them, and subject to the power of continuing the charge as thereinbefore provided. And the person so seised, or the lords or stewards respectively in his name, may, from time to time, adopt such means as a mortgagee in fee of freeholds is entitled to, for enforcing payment of such principal sums and interest, with the like right to obtain payment of all attendant and incidental costs and expenses; and the lord shall have power to distrain on lands in respect of which the said sum or sums shall be payable for receiving payment of interest due thereon as fully as if the same had been rent in arrear (*b*).

Remedies of mortgagees.

Priorities of charges.

Every such last-mentioned sum by the act charged on any lands shall be the first charge on such lands, and have priority over all mortgages, charges and incumbrances affecting such lands (except tithe rent-charges), notwithstanding such mortgages, charges and incumbrances shall be of earlier date than the charges under the act (*c*).

Charges by en-

Any tenant whose lands shall be enfranchised under the act may

(*z*) Sect. 68.

(*b*) Sect. 70.

(*a*) Sect. 69.

(*c*) Sect. 71.

charge the same (or any of them, provided he shall hold the whole under the same right and same estate) with the payment of such sums as aforesaid, and the costs of such charges and lawful interest thereon respectively, to any person who shall advance such sums on the security of the lands so to be charged, and his executors, administrators and assigns; and for securing the same with interest may demise the lands, by way of mortgage for any term of years, to the lender, his executors, administrators, assigns, or appointees; so as such demise be made with a proviso that the term shall be void on payment of the amount thereby secured with interest at an appointed time: and such charge shall have the like priority with the original charge under the act, and with the powers and rights to which a first mortgagee would as mortgagee by demise be entitled (*d*).

franchising  
tenants.

By another act (*e*) it was provided, that in addition and subject to the provisions of the act 4 & 5 Vict. c. 35, any enfranchisement may be made wholly or partly in consideration of a grant of an annual rent in fee, to be thenceforth charged upon and issuing out of the enfranchised lands; the rent to be valued and subject to variation as a commutation rent-charge under the said act.

1809.

Enfranchisement  
in consideration  
of annual rent.

If the consideration shall be wholly or partly a grant of an annual rent, the person empowered by the act to obtain enfranchisement may grant a rent to the person enfranchising, and his heirs, to the uses and upon the trusts, upon which the manor of which the lands are parcel was held at the time of enfranchisement; and may charge the rent on such of the lands enfranchised as shall be fixed on, and make the same payable by equal half-yearly payments (*f*). And the rent shall be a rent service, and shall be parcel of and appendant and appurtenant to the same manor as the lands enfranchised; and may be granted either by a deed or by a schedule of appointment, to be made and signed pursuant to the directions of the acts.

Mode of charging  
rent.

Rents created under the act are made a first charge, with priority over all other incumbrances, though of earlier date, except tithe rent-charges (*g*). And it is provided that sub-lessees shall not in consequences of any charge under the act be liable to the payment of a greater sum than if such charge had not been made (*h*).

Priorities of  
rent-charges.

By another act (*i*), the provisions of the former acts, as to the recovery of expenses, costs and charges, to be paid by any tenant being a trustee, and not beneficially interested in the lands of which he stands admitted tenant, to be affected by any commutation or enfranchisement under the acts, shall extend as well to cases in which

1810.

Recovery of costs,  
charges and ex-  
penses.

(*d*) Sect. 72.

(*e*) 6 & 7 Vict. c. 23, s. 1.

(*f*) Sect. 2.

(*g*) Sect. 7.

(*h*) Sect. 8.

(*i*) 7 & 8 Vict. c. 55, s. 1.

there shall not, as to those in which there shall be an apportionment or commutation on enfranchisement in pursuance of the acts.

Charges by persons with limited beneficial interests.

Every person beneficially interested in the lands, having a limited beneficial interest only, and who shall pay any such expenses, costs and charges to any tenant being such trustee as aforesaid, may, with the consent of the copyhold commissioners, by entry on the rolls of the manor, charge such expenses, costs and charges, with interest at 4*l.* per cent. per annum on the lands to which the same relate; but so that the principal charged on such lands be lessened in every year following such charge, by one-twentieth at least of such original charge, and shall be subject to previous mortgages (*k*).

Provisions as to charges applicable where no apportionment.

The provisions charging and securing, and authorizing the charging and securing, the consideration money of any enfranchisement under the acts, and the costs of the charges with interest, and also as to the priority of charges and securities for the same, and otherwise in reference thereto, are extended *mutatis mutandis* as well to cases in which there shall not, as to those in which there shall be an apportionment on enfranchisement under the acts. And on any enfranchisement where there is no apportionment, the charge of the consideration money and interest is to commence from the date of the conveyance or assurance by which the enfranchisement is made (*l*).

Distress and entry.

The provisions of the act 4 & 5 Vict. c. 35, s. 70, authorizing distress and entry in case of nonpayment of rent-charges to be granted under the act, are extended to all rent-charges granted and made payable under the act of 6 & 7 Vict. or the present act (*m*).

## 1811.

Where lord's compensation may remain as a first charge.

Under the Copyhold Act, 1852 (*n*), the compensation to be received by the lord for enfranchisement, where effected at the instance of the tenant, and where the compensation exceeds 20*l.*, shall, if the commissioners so direct, and with the consent of all incumbrancers, if any, whose incumbrances shall have been in existence at the passing of the act, remain as a first charge on the land enfranchised, until the expiration of such time, not exceeding ten years from the day of such completion, as the commissioners shall appoint, and interest at 4*l.* per cent. per annum shall be payable thereon half-yearly; and where the enfranchisement shall have been effected at the instance of the lord, the compensation shall be an annual rent-charge issuing out of the lands enfranchised. Provided that the parties to any enfranchisement under the act may agree, with the sanction of the commissioners, that the compensation shall be either a gross sum of money to be paid or charged as aforesaid, or a yearly rent-charge or a conveyance of land to be settled to the same uses as the manor of which the enfranchised lands are holden is settled,

(*k*) Sect. 2.

(*l*) Sect. 4.

(*m*) Sect. 7.

(*n*) 15 & 16 Vict. c. 51, s. 7.

as provided in the former acts with respect to enfranchisements effected by virtue thereof. And the valuers are to frame an award showing the amount, nature and particulars of the compensation, which is to be in full satisfaction of all manorial rights, save as thereafter mentioned.

Any charge under the act is to be a first charge on the lands, and to have priority over all incumbrances affecting such lands (except tithe commutation rent-charges or charges under the drainage acts), notwithstanding the earlier date or anterior title of such incumbrances. Provided that, notwithstanding any such charge, any monies already invested, or previously secured or charged on the lands, may be continued on the security thereof, notwithstanding the imposition of the charge under the act; and that no charge shall have priority over any incumbrance affecting the lands enfranchised at the passing of the act, without the consent of the persons entitled to such charge (o).

Every charge under the act shall be made by a certificate under the hands and seals of the commissioners, to be called a certificate of charge, and such certificate shall specify the whole amount of principal money to be charged on the lands enfranchised under the act, subject to which the land is enfranchised, and may specify any place to be agreed upon between the parties as the place of payment of the principal money and interest charged by the certificate, and may by the agreement of the parties and the direction of the commissioners provide that the principal money or any part thereof shall continue upon the security of the certificate for any term not exceeding ten years; and the lands charged may be described by reference to the enfranchisement under the acts or otherwise as the commissioners may think fit, and the certificate may be in the form set forth in the schedule to the present act, or in such other form as the parties, with the consent of the commissioners, may think proper, and shall be entered on the court rolls of the manor (p).

Charges to be effected by certificate.

The certificate and charge are made transferable by endorsement of the certificate, which may be in the form set forth in the schedule or to the like effect (q); and the certificates and transfers are chargeable with the like stamp duties as other mortgages and transfers (r):

Certificate and charge transferable.

Upon the request of the owners of land chargeable with a rent-charge under the acts, the commissioners shall certify, under their hand and seal, the sum of money in consideration of which the rent-charge may be redeemed; and when it shall appear to them that payment or tender of such consideration money has been duly made, the commissioners may certify that the rent-charge has been

Redemption of rent-charges.

(o) Sect. 10.  
(p) Sect. 12.

(q) Sect. 13.  
(r) Sect. 14.

redeemed under the act, and the certificate shall be final and conclusive. But no redemption under the act shall be effected of rent-charges created before the passing of the act, except with the consent in writing of the persons entitled to the receipt of such rent-charge (*s*).

What amounts to payment of consideration.

Where the person entitled to a rent-charge, redeemable under the act, shall be absolutely entitled to or shall be able to dispose of the fee simple in possession thereof independently of the act, and shall not be a spiritual person entitled in respect of his benefice or cure, or a corporation prevented from aliening such rent-charge otherwise than under the act, a payment or tender to the person so entitled of the sum of money certified by the commissioners as aforesaid, after six months' notice to the person entitled to the rent-charge, shall be deemed a due payment of the consideration money; and in every other case the payment of the money so certified under the act shall be deemed a due payment of the consideration money (*t*).

Occupying tenants may deduct payments from rent.

Any occupying tenant of any lands to be enfranchised under the act, who shall pay any rent-charge or interest which may become payable under the act, shall be entitled to deduct the amount thereof from the rent payable by him to his landlord, and shall be allowed the same in account with his landlord (*u*).

Mortgagee may enfranchise and redeem rent-charges.

A surrenderee by way of mortgage, under a surrender entered on the court rolls, and in the possession or receipt of the profits of the land, shall be deemed a tenant within the act entitled to obtain, or to join in obtaining and effecting enfranchisements and redeeming a rent-charge under the Copyhold Acts, with the approbation of the commissioners; and any money paid by any mortgagee in respect of the consideration or costs of enfranchisement, or redemption of rent-charge under the Copyhold Acts, shall be added to the amount due to him as mortgagee, and the land shall not be redeemable without payment of such money, with interest thereon (*x*).

## 1812.

Charge of compensation and expenses under Act of 1858.

By the Copyhold Acts Amendment Act, 1858 (*y*), the consideration or compensation money for commutation or enfranchisement, payable under the obligation of the Copyhold Acts, may, with the consent of the commissioners, be charged on the land commuted or enfranchised.

The absolute owner of land conveyed in consideration of or compensation for commutation or enfranchisement, may, with the consent of the commissioners, charge upon the land commuted or enfranchised such reasonable sum as in the judgment of the commissioners may

(*s*) Sect. 37.

(*t*) Sect. 38.

(*u*) Sect. 42.

(*x*) Sect. 43.

(*y*) 21 & 22 Vict. c. 94, s. 21.

be equivalent in value to the land conveyed (*z*). A lord, empowered by the acts to purchase the tenant's interest, has the same right to charge the land purchased, and also the manor and land settled therewith, to the same uses as the tenant has under the act to charge enfranchisement monies (*a*).

Expenses incurred under the acts may be charged on the manor or on the lands commuted or enfranchised, or on both, according as the obligations to pay may attach; or expenses payable by the lord may be paid out of the compensation or consideration money, or be charged on the rent-charge or other consideration or compensation for commutation or enfranchisement (*b*).

Any charge in respect of consideration or compensation, or of the purchase-money or of the value of land conveyed, may, when the parties agree and the commissioners approve, be made for principal and interest, or for a series of periodical payments, which at the termination thereof, at the period specified, shall leave the manor or land discharged (*c*).

Charge of principal and interest or of periodical payments.

When a lord or tenant is authorized by the acts to raise money on charge, or to purchase or convey any land, and charge the principal or purchase-money or the value on a manor or land, the expenses incurred about raising money on charge, or about the purchase, or purchase and conveyance, shall (but as distinct from the general expenses of commutation or enfranchisement) be considered, for all purposes or effects of charging, as part of the principal purchase-money or value to be charged (*d*).

Charge of special expenses of raising money, &c.

All other charges, in respect of expenses of proceedings under the Copyhold Acts (except expenses of purchase by the lord), shall be for such period as the parties may agree, and the commissioners approve, not exceeding fifteen years, and at such interest as stated in the certificate of charge (*e*).

If by reason of disputes as to title, it shall appear to the commissioners to be uncertain upon what person the order to pay costs or expenses should be made, the commissioners may grant to the person entitled to the costs or expenses a certificate of charge on the manor or land in respect of which the costs or expenses were incurred, which shall operate as other certificates of charge under the act (*f*).

Certificate of charge in case of disputed title.

Every charge under the act is to be by certificate (the contents and form of which is presented in the act) under the seal of the commissioners, countersigned by the person at whose instance the charge is made, and is to specify the nature and object of the charge, and is made transferable by endorsement (*g*).

Form of certificate of charge.

- (*z*) Sect. 22.
- (*a*) Sect. 23.
- (*b*) Sect. 24.
- (*c*) Sect. 25.

- (*d*) Sect. 26.
- (*e*) Sect. 27.
- (*f*) Sect. 28.
- (*g*) Sects. 29, 30.

Effect of certificate and charge belonging to lord with limited interest.

Whenever a lord of limited interest shall be entitled to a certificate of charge in respect of enfranchisement money left chargeable on enfranchised land, the charge shall remain appendant and appurtenant to the manor, but not so as to be incapable of being severed therefrom or affected by the extinction thereof; and the certificate of charge shall state that the lord to whom it is issued has only a limited interest in the charge; or it may purport to be issued to the lord for the time being of the manor; and either of such statements in the certificate shall be notice to all persons of the limited interest in the charge which may pass by the transfer of such certificate (*h*).

Stamp duties.

Awards of enfranchisement, certificates and transfers of charge under the act, are chargeable with the like stamp duties as deeds of enfranchisement, mortgages and transfers of mortgages (*i*).

Priorities of charges.

Any charge under the act, made in consideration of the value of land conveyed as consideration, or of consideration or compensation money, or of purchase-money, or the expenses of purchase and conveyances, is made a first charge on such manor or land, with priority over all incumbrances affecting the same (except tithe commutation rent-charges and charges or rent-charges under the drainage acts), notwithstanding the priority of date or anterior title of such incumbrances; but any monies already invested, or previously secured or charged thereon, may be continued on the security thereof, notwithstanding the imposition of the charge under the present act (*k*).

Certificates of charge not to merge.

Any certificate of charge may be taken by the lord, or tenant, or owner of any land charged thereby, and shall not merge in the freehold unless the owner of the charge shall by endorsement on the certificate of charge, or otherwise, declare in writing that the same shall merge and cease (*l*) (1299).

Remedies of owners of certificates of charge.

The owner for the time being of a certificate of charge shall, in respect of any payment in the nature of interest or instalment that may become due under the certificate, have the same remedies, and become subject to the same conditions in the recovery thereof, as are provided by the Copyhold Acts (1808) in respect of rent-charges; and for further remedy in that behalf, and in respect of any payment in the nature of interest, or of a periodical payment, or of an instalment, or of a gross principal sum that may be secured by the certificate, the manor or land shall, from the date of the certificate, stand charged with the respective sums mentioned in such certificate to be payable; and until such payment, the owner for the time being of the certificate shall stand seised of the land as a mortgagee in fee thereof, and the person so seised may, from time to time, adopt such proceedings as a

(*h*) Sect. 31.  
(*i*) Sect. 32.

(*k*) Sect. 33.  
(*l*) Sect. 34.



mortgagee in fee of freehold land is entitled to, for enforcing payment of principal or interest, with the like right to obtain payment of all attendant and incident costs and expenses (*m*).

The Copyhold Inclosure and Tithe Commissions were amalgamated by 14 & 15 Vict. c. 53, amended by 25 & 26 Vict. c. 73.

Amalgamation of copyhold and tithe commissions.

*Of the Equitable Jurisdiction of the County Courts over Securities.*

By the County Courts Equitable Jurisdiction Act (*n*) the county courts shall have and may exercise all the power and authority of the High Court of Chancery, in (amongst other matters),

**1813.**  
Jurisdiction of county courts in redemption and foreclosure suits.

All suits for foreclosure or redemption, or for enforcing any charge or lien, where the mortgage, charge or lien shall not exceed in amount the sum of 500*l.* (*o*).

Proceedings under the act which relate to the recovery or sale of any mortgage, charge or lien on lands, tenements or hereditaments shall be taken in that county court within the district of which the lands, tenements or hereditaments, or any part thereof, are situate (*p*) (1165).

*Of Securities under Improvement Acts.*

By 8 & 9 Vict. c. 56 (*q*), any tenant by the curtesy, or for his own or any other life or lives, or for years determinable on life or lives, infant by guardian or next friend, or idiot or lunatic by committee, married woman entitled for separate use by next friend, or husband of married woman entitled in her right, or feoffees or trustees for charitable or other purposes, or ecclesiastical or other corporation aggregate or sole, or mortgagee or incumbrancer in fee in possession, or person entitled in fee to any equity of redemption and in possession, are authorized to apply to the Court of Chancery for leave to make permanent improvements by draining, warping, irrigation, or embankment, and to pray that the expenses of the improvements may be a charge upon the inheritance.

**1814.**  
Persons who may have leave to charge estates with costs of improvements.

After inquiry by the court and certificate made and indorsed according to the act, the inheritance of the land will be charged with the money advanced and expended, with interest for the advance; and such charge will have priority over other charges except tithe commutation rent-charges, and any quit or chief rents incident to tenure: and a memorial of the charge is to be registered where it affects lands in a register county or in Ireland (*r*).

Priority and registration of charges.

(*m*) Sect. 35.

(*n*) 28 & 29 Vict. c. 99, **1165**, note.

(*o*) Sect. 1 (3). Whether the court is authorized by the act to *establish* a lien, which in respect of such liens as may be actively enforced is a necessary preliminary to

the relief, **846** (see *Att.-Gen. v. Sittingbourne, &c. Railway Co.*, L. R., 1 Eq. 636), *query*.

(*p*) Sect. 10. And see 38 & 39 Vict. c. 50, and Cons. County Court Orders, November, 1875.

(*q*) Sect. 3.

(*r*) Sects. 4, 5, 6.

Filing and effect of certificate.

The certificate is to be filed in the report office, and a signed duplicate thereof is evidence of the title to the money; and the security takes effect as from the granting of the certificate (*s*).

Rate of interest.

The money bears interest at a rate agreed upon, not exceeding 5 per cent. (*t*).

Mode of repayment.

The principal is repayable by equal annual instalments, not being less than 12 nor more than 18, in cases of improvements by drainage, warping, irrigation or embankment; and not less than 15 nor more than 18 where the improvements are by the erection of buildings (*u*).

Who liable for interest.

The petitioner, and every succeeding tenant for life, or person with limited interest, is bound to pay interest and instalments during the continuance of his title: on the termination of which, by death or otherwise, the inheritance is chargeable with not more than six years' arrears of interest then due, and one-half of the last instalment then due, and the interest and instalments thereafter to become due (*x*).

## 1815.

Power to charge lands for drainage works by direction of inclosure commissioners.

By 9 & 10 Vict. c. 101 (*y*), any person desirous to improve lands by drainage works, and to obtain advances under the act for executing them, may, as to lands in Great Britain (*z*), apply to the Inclosure Commissioners, who may, if they shall think fit, direct that the expenses of investigating and of inspecting and ascertaining the due execution of the works, or part of such expenses, shall be a charge upon the land. In case of the dissent, upon notice by advertisement, of any person having an estate in or charge upon the land to which the application relates, the commissioners shall certify such dissent to the owner of the land who makes the application, and who may then apply to the Court of Chancery, or to the Court of Session in Scotland, for authority to procure an advance under the act.

Certificates of advance.

Upon the execution of the works, the commissioners may issue a certificate of advance, specifying the land in respect of which the advance is to be made, and certifying that the sum therein mentioned should be issued to the person therein named; whereupon the advance is directed to be made by the Commissioners of the Treasury (*a*).

Security by way of rent-charge.

The land is charged with the payment in respect of the advance of a rent-charge at the rate of 6*l.* 10*s.* for every 100*l.* of such advance; and so in proportion for any less amount, to be payable for the term of 22 years by equal half-yearly payments (*b*).

(*s*) Sect. 7.

(*t*) Sect. 8.

(*u*) Sect. 9.

(*x*) Sect. 10.

(*y*) Sects. 14, 15, 17 (see 19 & 20 Vict. c. 9, s. 1), 18, 20, 21, 23, 24.

(*z*) The act also applies to Ireland, but an abstract of the numerous Irish improvement acts would have occupied more space than could conveniently be spared.

(*a*) 19 & 20 Vict. c. 9, s. 3.

(*b*) 9 & 10 Vict. c. 101, s. 34.

Every such rent-charge in England is made recoverable by the commissioners of stamps and taxes in the same manner as rent-charges in lieu of tithes under 6 & 7 Will. 4, c. 71; and such rent-charges are to be subsequent in order of charge to tithe rent-charges, and quit or chief rents incident to tenure, but to have priority over other charges on the same land; and such rent-charges in Scotland are to be recoverable as feu duty or annual rent or other payment to the crown, but subsequent in order of charge to feu duty, with preference over all other charges on the same land: but the rent-charge is to have no preference unless it be sued for within three years after it becomes payable (c).

Mode of recovery and priority of rent-charge.

No proprietor of an entailed estate in Scotland is to be held to have contravened the conditions of entail, by having availed himself of the act; and no rent-charge on any entailed lands in Scotland, under the act, is to be a ground of adjudging selling or evicting lands contrary to the provisions and conditions of entail, but is to be an effectual charge upon the entailed lands to every other effect, and upon the rents and profits thereof (d).

1816.

Provision as to Scotch entails.

The charge is not to be deemed such an incumbrance as to preclude a trustee of trust money to be invested on purchase of the land, or on mortgage, from investing in the purchase of or upon mortgage of land charged, unless the terms of the trust shall expressly provide that land so purchased or taken in mortgage shall not be subject to any rent-charge under the act (e).

Effect of charge upon trustee's powers of investment.

Every person on whose application a rent-charge is charged, and every succeeding heir of entail, tenant for life, life renter, or other owner of a limited interest, shall as between himself and those in remainder or reversion, be bound to pay half-yearly payments of the rent-charge during the continuance of his interest, and if in actual occupation, or entitled to an apportioned part of the rents to the time of the termination of his interest, shall be bound to pay an apportioned part of that half-yearly payment of rent-charge which shall become due next after the termination of his interest, proportioned to the time between the day of the previous half-yearly payment and the day of such termination (f). The act also provides for the deduction of the rent-charges by tenants or occupiers, and for the apportionment of rent-charges (g).

1817.

Liability of owners of limited interests to payment of rent-charge.

The owners of lands charged with rent-charges are at liberty, before the expiration of 20 years after the commencement thereof, to redeem such rent-charges or any part thereof, not being less than 10% per annum, on payment to the commissioners of stamps and

Owners of lands charged may redeem rent-charges.

(c) Sect. 35.

(d) Sect. 36.

(e) Sect. 37.

(f) Sect. 38.

(g) Sects. 40, 44; and sec 19 & 20 Vict. c. 9, s. 8.

taxes in Great Britain of arrears and of the aggregate amount of half-yearly payments not then due, after allowing discount at the rate of 3*l.* 10*s.* per cent. per annum in respect of such several future payments; and the Board of Inland Revenue are to deliver to such owners certificates of such redemption (*h*).

Securities not  
liable to stamp  
duty.

No bond, security, certificate or other instrument under the act is chargeable with stamp duty (*i*).

The powers conferred by the act are explained and regulated by a subsequent statute; and by a yet later act further provisions are made for facilitating improvements by drainage (*k*).

### 1818.

Charge by inclo-  
sure commis-  
sioners under  
27 & 28 Vict.  
c. 114.

By the Improvement of Land Act, 1864 (*l*), when the commissioners are satisfied that the improvements defined in (*m*) the act, or part thereof, have been properly executed, they are to execute a charge, under their hands and seal, on the inheritance or fee of the land, or some sufficient part thereof, for the sum by the provisional or other sanctioning order expressed to be chargeable in respect of the improvements, or for a proportional part thereof, if only part of them have been executed, together with the interest by the same order expressed, and the amount which shall have been paid in respect of the purchase of adjoining lands, or of any easement or right affecting adjoining lands, with interest at the like rate (*n*).

Charge may in-  
clude expenses  
and interest.

The commissioners have power, at the request of the land-owner (*o*), to include in the principal money charged the expenses of the application to the commissioners, or of his contract with any company or person relating to the execution of the improvements; or to the advance of money for their execution; and may also include interest not exceeding 5*l.* per cent. per annum on all payments forming part of the principal money, from the dates of such payments to that of the absolute order, but so as no interest be allowed on any such payments for more than six years; provided that the total amount of principal charged on the lands improved shall not exceed that to which the inheritance or fee of the lands improved will be directly benefited by the improvements (*p*).

Charge created  
by absolute order  
by way of rent-  
charge.

Every charge under the act is to be created by an order called an absolute order, and by way of rent-charge, payable half-yearly, for

- |  |                                       |
|--|---------------------------------------|
| ( <i>h</i> ) Sect. 45; 19 & 20 Vict. c. 9,<br>s. 10.   | 19 & 20 Vict. c. 9.                   |
| ( <i>i</i> ) Sect. 47.   | ( <i>l</i> ) 27 & 28 Vict. c. 114.    |
| ( <i>k</i> ) 10 & 11 Vict. cc. 11, 38; and<br>see 11 & 12 Vict. c. 119; 13 & 14<br>Vict. c. 31; 14 & 15 Vict. c. 53; | ( <i>m</i> ) See sect. 9.             |
|  | ( <i>n</i> ) Sect. 49.                |
|  | ( <i>o</i> ) See definition, sect. 8. |
|  | ( <i>p</i> ) Sect. 50.                |

the term of years fixed by the sanctioning order; the first payment to be six months after the time when the works were executed to the satisfaction of the commissioners. The payment for each half-year is to be expressed to be, as to part, a repayment of a certain amount of principal money, and as to the remainder a payment of interest, and is to be stamped as a mortgage for a like amount, and a copy is to be authenticated by the seal of and kept by the commissioners, and such copy and any copy thereof authenticated by their seal shall be evidence of the contents and purport of the absolute order (g).

The charges are to be according to the form in the schedule, or as near thereto as circumstances will admit (r).

Whenever by assignment under the act (s) or otherwise a company shall become entitled to the creation of a charge under the act, the commissioners may create such charge in the form of, and so that it may operate as, an absolute or other corresponding order under the act or acts applying to such company (t).

Form of charge in favour of company.

Improvement companies, by notice to the commissioners, may adopt the act, and with the sanction of their shareholders, according to the act, may execute or advance money for improvements under it, although not authorized to do so by their own act (u).

Adoption of act by improvement companies.

The execution of the absolute order by the commissioners is to be conclusive evidence, in all courts, and for all purposes, of the validity of the charge expressed to be made, and no inquiry is to be permitted into the title or estate of the landowner, or the due performance of anything required to be done by the act, or as to any other matter upon which the validity of the charge might, but for this enactment, have depended (x).

Absolute order conclusive evidence of charge.

A memorial of the absolute order creating the rent-charge in England or Wales is to be registered at the office of Land Registry in England, and in Ireland in the deed and will registry there, as mentioned in the act; and all grants of rent-charges in Scotland are to be registered in the general or particular registry of Sasines. Provided that every rent-charge to which the present clause applies shall have priority, as is declared in the act (y).

Charge to be registered in land registry.

Where the costs of any public or general improvements are authorized to be charged upon the inheritance of the lands improved, any landowner who shall have been assessed and shall have become liable for any such charge in respect of his land may apply to the commissioners to sanction the charging of the money so assessed upon the

Costs of general improvements may be charged on lands improved.

(g) Sect. 51.

(u) Sect. 54.

(r) Sect. 52.

(x) Sect. 55.

(s) See sect. 26.

(y) Sect. 56; see sect. 59.

(t) Sect. 53.

land in respect of which the landowner shall have been so assessed, and the commissioners may, after the money shall have been paid by the landowner, charge the same by an absolute order upon the inheritance or fee of the land in respect of which the assessment was made and paid, or so much thereof as the commissioners will sanction, with interest (z).

Such absolute order and charge may be in any form, and for any term permitted by the act, which applies in like manner as if the order and charge were made in respect of improvements on the land executed under the act; and the commissioners may charge the land with the costs, charges and expenses of the application and order, or any contract connected therewith, as under sect. 50, respecting works executed under the act (a).

Charge is from date of absolute order.

Priority of charge.

From the date of the absolute order, the grantee, his executors, administrators, successors and assigns, have a charge upon the lands for the principal money from time to time undischarged, by payment of the rent-charge with interest at the rate expressed: and with priority over every other then existing and future charge and incumbrance affecting the lands or estates and interests respectively, whether created under the powers of any act of parliament or otherwise, except quit rents, crown rents, chief rents, feu duties, ground annuities, and other charges incident to tenure, tithe commutation rent-charges, and teinds, charges under any act authorizing advances of public money for improvement of land, and charges created under this act, or of prior date created under any other existing act authorizing the charging of lands with the expense of and incident to their improvement. Provided that if part only of the land charged is subject to a mortgage or other incumbrance, the charge created under the act shall have priority only to the extent of a due proportion of such charge, when and so soon as the same shall be ascertained under section 68 (b).

Charges to be personalty, but may be merged.

Charges made lawful investments for trust monies.

Every charge under the act as regards the holder is to be deemed personal property, but every holder may direct by deed that it be reunited to, and merge in, the beneficial interest in the land as if it were of the same nature and tenure; and all trustees, directors and others, authorized to invest on real security, may invest on such charges or on mortgages thereof, unless the contrary be provided by the instruments directing or authorizing the investments (c) (427).

Charges not to

No charge made by any absolute order under the act shall be

(z) Sect. 57.

(a) Sect. 58.

(b) Sect. 59. Under similar words in the Lands Improvement Companies Act, 1855 (18 & 19 Vict. c. lxxxiv), it was held, that the statutory security had priority as to

its whole amount over another incumbrance with which part only of the land was charged, until an apportionment had been made. (*Lands Improvement Co. v. Richmond*, 17 C. B. 145.)

(c) Sect. 60.

deemed to be such an incumbrance as shall preclude a trustee, with power to invest in the purchase of land or mortgage, from investing it in the purchase or mortgage of land so charged, unless the terms of the trust or power expressly provide that lands to be purchased or taken in exchange be not subject to any prior charge (*d*).

preclude trust investments.

The act contains provisions respecting Scotch entails and the recovery of the rent-charges corresponding with those in sects. 36 and 35 of 9 & 10 Vict. c. 101 (*e*) (1816).

Scotch entails.

If any rent-charge be in arrear, the arrear is not to bear interest for more than six months, but interest at the rate of 5*l.* per cent. in respect thereof is recoverable in the same manner as the sum in arrear. Provided that, if at the end of six months from the time of any payment falling into arrear, there shall not be on the land charged a sufficient distress to answer the said payment and interest, then the arrears of such payment shall bear interest at 5*l.* per cent. per annum till satisfaction; and such interest may be recovered in the same manner as the sum in arrear (*f*).

Interest on arrears.

The person entitled to a rent-charge may assign it by a deed duly stamped, and the assignment may be according to the form mentioned in the schedule, or as near as may be, and shall be effectual to vest both at law and in equity the charge thereby assigned, and all powers, authorities, rights and remedies of the assignor, in the assignee, his successors, executors, administrators and assigns, and notice of the assignment is to be sent to the commissioners at their office in London (*g*).

Assignment of rent-charges.

The act does not provide for the registration of assignments.

The act contains provisions for the discharge of the periodical payments of the rent-charge by persons having limited interests, corresponding with section 38 of 9 & 10 Vict. c. 101 (1817), with a proviso that no person becoming entitled in possession to any estate or interest in land shall be liable, as between himself and the persons entitled to the rent-charge, to pay any arrears of charge remaining unpaid at the time of his becoming so entitled in possession, beyond the amount of two years' payment of such charge. And that the amount paid by any person in respect of such arrears, and any costs occasioned by non-payment thereof, shall be a debt from the person who in the first instance ought to have paid the same, or from his estate, to the person who paid the same, and shall be recoverable accordingly (*h*).

Liability of owners of limited interests.

The tenant of the land paying the charge is to be entitled to deduct the amount from his rent, except as to such part thereof as

Tenant paying charge may deduct it from rent.

(*d*) Sect. 61.  
(*e*) Sects. 62, 63.  
(*f*) Sect. 64.

(*g*) Sect. 65.  
(*h*) Sect. 66.

he has agreed to be charged with during his occupation; and where the improvements include other lands, the commissioners may declare in the absolute order, what part of the whole charge payable in respect of the improvement shall be payable by such tenant or occupier during his tenancy, in respect of probable improvement of the land included in his tenancy (*i*).

If land charged under the act, or under any act authorizing the creation of charges by the commissioners, is occupied in several holdings, or has become the property of separate owners, or the owner is entitled under separate titles or for distinct and separate interests, or is desirous to sell or dispose of part of such land, or part only of such land is subject to any mortgage or other incumbrance, or for any other reason it is desirable that the charge should be apportioned or a part of the land charged released therefrom, the commissioners may, with the consent of the land-owner, or of any one of such separate owners, or of such mortgagee or incumbrancer, but with due notice to the grantee or assignee of the charge, or to the husband, guardian, tutor, curator, committee or trustee of such grantee or assignee, if under disability, and to such other persons as the commissioners think right, release from such charge any part of the land charged, or apportion it on separate lands or on the part subject to the mortgage or incumbrance, and on the residue; but so that no apportioned charge shall be less than twenty shillings for each half-yearly payment, and so that no lands shall thereby be charged beyond the amount to which they have been durably benefited by the improvements (*k*).

Commissioners  
may release lands  
or apportion  
charge.

Every such apportionment or release is to be in the form given in the act, and is to be registered and evidenced as in section 56 (*l*); and such apportioned or released charges are to be recoverable out of the apportioned lands, or lands not released, as original charges under the act (*m*).

Where lands are charged by more than one absolute order, any order of apportionment or release under the preceding sections may comprise all or any number of the rent-charges existing by virtue of such absolute orders (*n*).

## 1819.

Charges on and  
mortgages of  
allotments and  
exchanged lands  
to secure ex-  
penses of inclo-  
sure under  
41 Geo. 3, c. 109.

### *Of Securities under Inclosure Acts.*

By an act for consolidating the provisions of inclosure acts, it was provided (*o*) that where the expenses of obtaining and executing the act are payable by the proprietors of the lands to whom any allotments shall be made, it shall be lawful for the husbands, guardians, trustees, committees or attornies of any of the owners or proprietors

(*i*) Sect. 67.

(*k*) Sect. 68.

(*l*) Sect. 69. The reference in the act is erroneously to sect. 54.

(*m*) Sect. 70.

(*n*) Sect. 71.

(*o*) 41 Geo. 3, c. 109, s. 30; and  
sect 6 & 7 Will. 4, c. 115, ss. 45—  
48.



of allotments or exchanged lands being under disability, and for any of the said owners or proprietors, being tenants in tail, or for life or lives, or years determinable on life or lives, or on any other contingency, or otherwise interested as aforesaid (except the rector or vicar of the parish), to charge such allotments or exchanged lands and premises with such sum or sums of money as by the award, or by any writing under the hands of the inclosure commissioners, they shall adjudge necessary to defray the respective shares of the charges incident to and attending the obtaining and executing the act, and of charging the land, so that the same shall not exceed 5*l.* for every acre of such allotments or exchanged lands; and to mortgage or otherwise subject the hereditaments so to be charged for any term of years; or in case any person in possession who shall be liable to, and charged with, a share of such expenses, or enabled to charge the land with the same, shall advance and pay the money, the commissioners may mortgage or subject the lands to such person for any term of years for the payment of such monies, with interest to commence on the termination of the right of such person in the premises; so that every such security be made with a proviso to cease and be void, or with an express trust to be surrendered or re-assigned, when the money thereby to be secured shall be fully satisfied; and with a covenant to keep down the interest, so that no person afterwards becoming possessed of or entitled to any such lands or hereditaments shall be liable to pay arrears of interest for more than six calendar months preceding the time when the title to such possession shall have commenced.

By another act (*p*) it is lawful for all persons interested in allotments in severalty, or allotments of stints, or rights of pasture respectively, to be made under the act, being tenants for life or in tail, or for any other estate of freehold or inheritance, and for the husbands, guardians, trustees, committees, or attornies respectively, or persons acting as such of persons under disability, or beyond the seas, and for the trustees or feoffees for charitable, parochial, or other uses, or the majority in number of them, in respect of lands held in trust for such uses, with the consent of the commissioners under their hands and seal, and for the incumbent of any ecclesiastical benefice, with the consent in writing of the bishop of the diocese and of the patron of the benefice, from time to time to charge their respective allotments with not more than 5*l.* per acre towards their respective proportions of the inclosure expenses; and for securing repayment, with interest, to mortgage or demise the allotments unto or in trust for any lender for any term of years, but with a condition to cease, or upon trust to be surrendered or assigned, when the money and interest shall have been fully paid, so that in every such mortgage or demise made by or on behalf of any person entitled to any such allotment for life, there be contained a covenant to pay interest during his life;

1820.

Powers under  
8 & 9 Vict. c. 118,  
s. 133.

Repayment of  
one-thirtieth of  
principal yearly.

but that no person afterwards becoming possessed shall be subject to more than six months' arrears previous to the time when his title shall commence: and every incumbent of a benefice, by whom such mortgage or demise shall be made, shall keep down the interest on so much of the principal as shall remain owing; and shall repay, in reduction of principal, one-thirtieth of the money originally secured, at the end of one year from the date of the mortgage, and a like sum at the end of each succeeding year until the whole be repaid; and every such mortgagee and his assigns shall have the like remedies in case of non-payment of the monies thereby secured, as in case of other mortgages of the like nature.

Money to be paid  
to commissioners.

Where (g) any persons shall, under the provisions of the last-mentioned act, mortgage their allotments, or demise the same in trust to raise money to defray inclosure expenses, the money shall be paid to the commissioners, whose receipt is made a sufficient discharge to the mortgagee or lessee; and the money shall be applied by the commissioners for the purpose for which it may be raised under the act.

Where a sum of money, part of the proceeds of the sale of settled estates, was paid by the trustees of the settlement (who had power to apply it in discharge of incumbrances affecting the estates) to the tenant for life, and he retained it in payment of expenses incurred by him in inclosures; it was held that though, by reason of his death, the formalities required by the acts of 8 & 9 Vict. and 11 & 12 Vict. could not be complied with, yet as there was considered to be evidence of his intention to charge the money on the allotments, so much of the advance as was properly expended about the inclosure, not exceeding 5*l.* per acre, was a charge on the allotments (r).

## 1821.

Inequalities of  
value may be  
compensated by  
rent-charges.

Under another act, inequalities of value of lands exchanged, and of allotments on partitions, effected under the inclosure acts, may be compensated by rent-charges where the deficiency in value of any hereditaments to be compensated does not exceed one-eighth part of the actual value thereof (s).

Amount and  
priority of charge.

The amount of the rent-charge is to be fixed by the inclosure award, or the order of exchange or partition. Every rent-charge is valid and indefeasible against the land charged, subject only to the tithe rent-charge, land-tax, local rates and taxes, quit or chief rents incidental to tenure, and charges created under drainage or improvement acts; and prior to all other charges, and recoverable as tithe rent-charge under 6 & 7 Will. 4, c. 71 (t).

(g) 11 & 12 Vict. c. 99, s. 8.  
(r) *Vernon v. Earl Manvers*, 31  
Beav. 617; 9 Jur., N. S. 9.

(s) 20 & 21 Vict. c. 31, ss. 6, 7, 8.  
(t) Sects. 9, 10.

Every rent-charge created under the act is to enure to the same uses and trusts, and is subject to the same conditions, charges and incumbrances, as the lands in respect of the deficiency in the value whereof such rent-charge is made payable will stand and be limited, after the confirmation of the inclosure award, or order of exchange or partition, as the case may be (u).

Charge to be subject to same incidents as lands, in respect of deficiency whereof it is granted.

*Of Redemption by the Promoters of Undertakings under the Lands Clauses Consolidation Act, 1845.*

The Lands Clauses Consolidation Act provides that (x),—

The promoters of the undertaking may purchase or redeem the interest of the mortgagee of any lands which may be required for the purposes of the special act, whether they shall have previously purchased the equity of redemption or not, and whether the mortgagee shall be entitled in his own right or in trust; and whether he be in possession by virtue of the mortgage or not, and whether the mortgage affect the lands solely or jointly with any other lands not required for the purposes of the special act.

And in order thereto, the promoters may pay or tender to the mortgagee the principal and interest due, together with his costs and charges, if any, and six months' additional interest; and thereupon the mortgagee shall immediately convey his interest in the lands comprised in the mortgage to the promoters, or as they shall direct, or the promoters may give notice in writing to the mortgagee that they will pay off the principal and interest due on the mortgage at the end of six months computed from the day of giving the notice; and if they shall have given any such notice, or if the party entitled to the equity of redemption of any such lands shall have given six months' notice of his intention to redeem, then at the expiration of either of such notices, or at any intermediate period, upon payment or tender by the promoters to the mortgagee of the principal money due, and the interest which would become due at the end of six months from the time of giving either of such notices, together with his costs and expenses, if any, the mortgagee shall convey or release his interest in the lands comprised in the mortgage to the promoters, or as they shall direct.

1822.

Power to redeem mortgages.

If, on such payment or tender, any mortgagee shall fail to convey or release his interest in the mortgage as directed by the promoters, or shall fail to deduce a good title to their satisfaction, the promoter's may deposit in the bank the principal, interest and costs if any due on the mortgage, and also if payment be made before the expiration of six months' notice, such further interest as would at that time become due, and they may execute a deed poll, duly stamped in the manner provided by the act in the case of the purchase of lands by them; and thereupon, as well as upon such conveyance by the mort-

Deposit of mortgage money on non-conveyance by mortgagee.

(u) Sect. 11.

(x) 8 & 9 Vict. c. 18, s. 108.

gagee if any such be made, all the estate and interest of the mortgagee and of his trustees and cestuis que trust shall vest in the promoters, and they shall be entitled to immediate possession if the mortgagee were himself entitled to possession (y).

Compensation where property is of less value than debt.

If the mortgaged lands are of less value than the principal, interest and costs, the value or compensation shall be settled between the mortgagee and the owners of the equity of redemption on the one part and the promoters of the undertaking on the other part, and if they cannot agree the same shall be determined as in other cases of disputed compensation; and the amount of the value or compensation shall be paid by the promoters to the mortgagee in satisfaction pro tanto of the mortgage debt; and upon payment or tender the mortgagee shall convey or release all his interest to the promoters of the undertaking or as they shall direct (z).

Deposit in bank upon non-conveyance.

If upon such payment or tender any mortgagee shall fail to convey, or adduce a good title, the promoters may deposit the amount of the value or compensation in the bank, and every payment or deposit shall be accepted by the mortgagee in satisfaction of the debt pro tanto, and shall be a full discharge of the land from all money due thereon; and the promoters may execute a deed poll in the manner provided in the case of purchase; and thereupon the estate and interest in the lands of the mortgagee or his trustee shall become absolutely vested in the promoters, and they shall be entitled to immediate possession if the mortgagee were so entitled; but all rights and remedies possessed by the mortgagee against the mortgagor by virtue of any bond, covenant or obligation, other than the right to such lands, shall remain in force in respect of so much of the mortgage debt as shall not have been satisfied by such payment or deposit (a).

Where only part of land required which is of less value than debt.

If part only of the mortgaged lands be required, and the part required be of less value than the principal, interest and costs, and the mortgagee shall not consider the residue of the lands sufficient security for the money charged thereon, or shall not be willing to release the part required, the value of such part, and also the compensation to be paid in respect of severance or otherwise, shall be settled by agreement between the mortgagee and the owner of the equity of redemption, and the promoters of the undertaking; and if the parties fail to agree shall be determined as in other cases of disputed compensation, and the amount shall be paid to the mortgagee in satisfaction of the mortgage debt pro tanto, and thereupon the mortgagee shall convey or release all interest in the mortgaged lands, the value whereof shall have been so paid, and a memorandum shall be indorsed on the deed creating the mortgage, and shall be

(y) Sect. 109.

(z) Sect. 110.

(a) Sect. 111.

signed by the mortgagee, and a copy of the memorandum shall, if required, be furnished by the promoters at their expense to the party entitled to the equity of redemption of the lands comprised in the mortgage deed (b).

If upon payment or tender to the mortgagee of the value or compensation, the mortgagee shall fail to convey or release to the promoters his interest in the lands in respect of which compensation shall have been paid or tendered, or shall fail to adduce a good title, the promoters may pay the amount into the bank, and the amount so paid shall be accepted by the mortgagee in satisfaction of the debt pro tanto, and shall be in full discharge of the portion of the mortgaged lands required; and on execution by the promoters of a deed poll duly stamped, the lands shall become absolutely vested in them as to the estate and interest of the mortgagee, or any person in trust for him; and they shall be entitled to immediate possession if such mortgagee were so entitled; but the mortgagee shall have the same powers and remedies for recovering or compelling payment of the mortgage money, or the residue thereof and the interest thereof, upon and out of the residue of the mortgaged lands or the portion not required for the purposes of the special act as he would have had out of the whole of the lands originally comprised in mortgage (c).

Deposit in bank upon non-conveyance.

If the mortgagee shall have been required to accept payment of the whole or part of his mortgage money at a time earlier than that limited by the deed, the promoters of the undertaking shall pay him, in addition to the sum which shall have been paid off, all such costs and expenses (to be taxed in case of difference and payment enforced according to the act) as shall be incurred by the mortgagee in respect of or which shall be incidental to the re-investment of the sum paid off, the costs in case of difference to be taxed and payment enforced in the manner provided with respect to the costs of conveyances; and the mortgagee is entitled to compensation for any loss to be sustained by him by reason of the premature discharge of his mortgage debt, if the rate of interest secured by the mortgage be higher than at the time of repayment can reasonably be expected to be had upon re-investment, regard being had to the then current rate of interest; until payment or tender of which compensation, the promoters of the undertaking are not, as against the mortgagee, to be entitled to possession (d).

Where mortgagee required to accept payment before time fixed.

As to lands charged with rent service, rent-charge, or chief or other rent or other payment or incumbrance not before provided for

Settlement of disputed compensation.

Any difference between the promoters and the party entitled to a

(b) Sect. 112.  
(c) Sect. 113.

(d) Sect. 114.

charge on the lands required as to the consideration to be paid for the release of the lands therefrom, or from the portion affecting the lands required for the purposes of the special act, is to be determined as in other cases of disputed compensation (e).

Apportionment  
of charge.

If part only of the lands charged with the rent or incumbrance be required for the purposes of the act, an apportionment of the charge may be settled by agreement between the owner of the charge and the owner of the lands and promoters; and if the apportionment be not settled by agreement the same may be settled by two justices; but if the remaining part of the lands so jointly subject be a sufficient security for the charge, then, with the consent of the owner of the lands so jointly subject, the party entitled to the charge may release the lands required on condition or in consideration of the other lands remaining exclusively subject to the whole charge (f).

Deposit in bank  
upon non-con-  
veyance.

On payment or tender of the compensation so agreed or determined to the owner of the charge, such owner shall execute a release of the charge, and if he fail to do so, or to adduce a good title to the charge, the promoters may deposit the amount of compensation in the bank; and may execute a deed poll, duly stamped in the manner provided in the case of purchases, and thereupon the rent service, rent-charge, chief or other rent, payment or incumbrance, or the portion thereof in respect whereof compensation shall have been paid, shall cease and be extinguished (g).

Where land  
released was  
subject jointly  
with other lands.

If any such lands be so released from any charge or incumbrance, or portion thereof, to which they were subject jointly with other lands, such last-mentioned lands shall alone be charged with the whole of such charge, or with the remainder thereof, as the case may be; and the party entitled to the charge shall have the same rights and remedies over the last-mentioned lands for the whole, or for the remainder of the charge, as the case may be, as he had previously over the whole of the lands subject to the charge; and if upon such charge or portion of charge being so released, the deed or instrument creating or transferring such charge be tendered to the promoters of the undertaking for the purpose, they or two of them shall subscribe, or, if they are a corporation, affix their common seal to a memorandum of such release endorsed upon such deed or instrument, declaring what part of the lands originally subject to such charge shall have been purchased by virtue of the special act; and if the lands be released from part of such charge, what proportion of such charge shall have been released, and how much thereof continues payable; or if the lands required shall have been released from the whole of such charge, then that the remaining lands are to remain exclusively charged therewith; and such memorandum shall

(e) Sect. 115.

(f) Sect. 116.

(g) Sect. 117.

be made and executed at the expense of the promoters, and shall be evidence of the facts therein stated, but not so as to exclude any other evidence of the same facts (*h*).

*Of Securities under the Land Tax Redemption Acts.*

By the Land Tax Redemption Act (*i*), for the purpose of redeeming land tax charged on hereditaments belonging to any persons not being bodies politic or corporate, or companies, feoffees or trustees for charitable or other public purposes, the persons in possession or beneficially entitled to the rents, but not having the absolute estate or interest in the property (except tenants at rack rent and crown tenants of the duchy of Lancaster or Cornwall), are empowered to mortgage the lands in fee or for a term, where they are not copyhold or of customary tenure, or to grant rent-charges to secure money raised for the redemption of the land tax (*k*).

Similar powers are given to committees and curators of lunatics or idiots, and to all executors and administrators, curators or trustees having authority to act for infants, minors, issue unborn, femmes covert, or other incapacitated persons (*l*).

The securities are to be made under the authority and with the consent and approbation of the commissioners of the Treasury, or any three or more of them, certified by their signing and sealing the instrument (*m*).

Where the consideration money for the security does not exceed 1,000*l.*, the security is not liable to any stamp duty (*n*).

Like powers of sale, mortgage and granting rent-charges are given to bodies politic or corporate, companies and trustees of feoffees for charitable or other public purposes (*o*).

*Of Securities under the Municipal Corporation Acts.*

By the Municipal Corporations Act (*p*), the councils of bodies corporate, elected under the act, are restrained from mortgage and alienation of the lands, tenements or hereditaments of the corporation, except with the consent of the lords commissioners of the Treasury, and after such notice as is required by the act. And by the Municipal Corporations Mortgages Act, 1860 (*q*), in any case where the commissioners of the Treasury approve of any mortgage of any hereditaments of the body corporate of any borough, they may, as a condition of their approval, require that the money borrowed on the

1823.

Persons with limited interests may mortgage or grant rent-charges for redemption of land tax.

Trustees and others may create securities.

Securities to be approved by commissioners of Treasury.

No stamp duty where consideration does not exceed £1,000.

Powers to corporations, &c.

1824.

Municipal corporations can only mortgage with consent of Treasury.

Who may require conditions as to mode of repayment.

(*h*) Sect. 118.

(*i*) 42 Geo. 3, c. 116.

(*k*) Sect. 51.

(*l*) Sect. 53.

(*m*) Sect. 54; 1 & 2 Vict. c. 53.

(*n*) 42 Geo. 3, c. 116, s. 68.

(*o*) Sects. 69, 76.

(*p*) 5 & 6 Will. 4, c. 76, s. 94.

(*q*) 23 Vict. c. 16, s. 1.

Nature of  
security.

security of such mortgage shall be repaid, with all interest thereon, in thirty years, or any less period, and either by instalments or by means of a sinking fund, or both, as the commissioners may think fit; and in every such case, the sums required for providing the repayment of the principal and interest of the money borrowed become charged, by virtue of the act, upon the hereditaments comprised in such mortgage (without prejudice to the security thereby created); or any other hereditaments (if any) of the body corporate, or the borough fund, or the borough or other rates, legally applicable for the payment or discharge of the money borrowed, or the expenses which it may be borrowed to defray, or on all or any of the securities aforesaid, as the said commissioners may direct.

Discharge by  
means of sinking  
fund.

When money so borrowed is directed to be paid by a sinking fund, the council of the borough are directed (*r*), out of the rents of the hereditaments, or out of the borough fund, or rates on which the sums required for the sinking fund are charged under the act, to invest such sums, at such times, and in such government annuities, as the commissioners may direct; and in like manner to invest and accumulate the dividends; and the annuities purchased are to be placed to the account of the corporation in the matter of the act, and the dividends to be paid to such person as the council shall appoint, and to be invested; but the annuities are not to be sold or transferred without the consent, in writing, of the commissioners of the Treasury.

Powers of  
Treasury as to  
investments for  
sinking fund.

Where, before the passing of the act, the commissioners of the Treasury have approved of any mortgage of the corporation property, and have required a sinking fund to be formed in the names of trustees, the commissioners are empowered (*s*) to require the securities in which investments have been already made, to be transferred into the name of the corporation, in the matter of the act, or to require any money applicable for the purposes of the sinking fund to be invested in the purchase of government annuities in the name of the corporation, in the matter of the act.

Provision for  
discharge of old  
debts.

For the discharge of mortgage debts incurred before the passing of the act, and for which there was no legal provision, corporations are empowered (*t*) to submit to the lords of the Treasury any scheme for the discharge of such debts by instalments, or by a sinking fund, or by both, extending over any term of years; and if the commissioners approve of such scheme, the sums required are charged, by virtue of the act, upon the hereditaments of the corporation, the borough fund or rates, or any other rates applicable to the discharge of such debts, or on any of the said securities, as the commissioners may approve and direct; and the above provisions, applicable to the

(*r*) Sect. 2.  
(*s*) Sect. 6.

(*t*) Sect. 10.



repayment of money borrowed on mortgage by a sinking fund and instalments, or both, except the limitation to a period of thirty years, are made applicable to the provision for the discharge of a mortgage debt under this section: provided that notice of the application to the commissioners for the approval of the scheme be given, and a copy of the memorial to be sent be open to inspection, as in cases of application to the commissioners for their approval of a disposition of hereditaments.

*Of Securities under the Public Works and Fisheries Acts.*

A long series of statutes commencing with 57 Geo. 3, c. 34, and by which the commissioners of the Treasury were authorized to make advances of public money for various useful public works and purposes, taking securities for the repayment thereof upon the works, and the tolls and other proceeds derived therefrom, has been repealed by the Public Works Loans Act, 1875 (*u*), by which the Public Works Loan Commissioners have power to make loans for any of the works mentioned in the first schedule to the act to any person having statutory or other power to borrow for such purpose.

1825.

*Of Securities by Railway Companies.*

By the Railway Companies Securities Act, 1866 (*x*)—

1826.

The term "railway" includes a tramway authorized by act of parliament incorporating the Companies Clauses Consolidation Act, 1845.

Interpretation.

"Railway company" includes every company authorized by act of parliament to raise any loan capital for the construction or working of a railway, or for any other purpose connected with the conveyance by such company of traffic on a railway, either alone or in conjunction with other purposes.

The term "act of parliament" includes a certificate of the Board of Trade under any act of parliament (*y*).

Every railway company is to register and keep registered at the office of the Registrar of Joint-Stock Companies in England, the name of their secretary, accountant, treasurer or chief cashier for the time being authorized by them to sign instruments under the act; or if they think fit the names of two or more such officers of the company so authorized, such officers or any one of them to be called the registered officer (*z*).

Registration of name of registered officer.

Within fourteen days after the end of each half-year (which is fixed by the act), the company is to make an account of its loan capital authorized to be and actually raised to the end of that half-year, specifying the particulars described in part 1 of the first

Half-yearly accounts of loan capital to be made.

(*u*) 38 & 39 Vict. c. 89.

(*y*) Sect. 2.

(*x*) 29 & 30 Vict. c. 108, s. 1.

(*z*) Sect. 3.

schednle (a) (1827), the Board of Trade being empowered to prescribe the form of the account (b).

Accounts may be inspected.

The loan capital half-yearly account may be perused at all reasonable times, by any shareholder, stockholder, mortgagee, bond creditor, or holder of debenture stock, or any person interested in any mortgage, bond or debenture stock of the company (c).

Copy of loan capital account to be registered.

A copy of the loan capital half-yearly account, certified and signed by the registered officer, is to be deposited with the registrar of joint-stock companies in England, within twenty-one days after the end of each half-year, and the company is at liberty to deposit like copies with the registrar of joint-stock companies in Scotland, and with the assistant-registrars of joint stock companies in Ireland (d).

Statement to be deposited on raising loan.

It is unlawful for any railway company to borrow any money on mortgage or bond, or to issue any debenture stock under any act of the session or passed after the end of the half-year to which their then last registered loan capital half-yearly account relates, unless and until they have first deposited with the registrar of joint-stock companies in England, a certified and signed statement specifying the particulars described in part 2 of the first schedule (1828), and the form of which account may be prescribed by the Board of Trade; and copies of which may also be deposited in Scotland and Ireland (e).

Penalties.

Penalties are enacted against the company for breaches of the above regulations; and a general power is given to inspect the documents kept by the registrar or assistant-registrar under the act (f).

Declaration to be placed on mortgages and bonds.

A declaration in the form or to the effect mentioned in the second schedule to the act (1829), is to be placed on every mortgage deed or bond given after the 21st January, 1867, by a railway company for securing money borrowed by the company, and on every certificate given after that day by a railway company for every sum of debenture stock issued by the company; the declaration being signed by two directors specially authorized, and appointed by the board of directors to sign such declarations, and by the company's registered officer (g). And penalties are enacted against the breach of this regulation, and in case of the signature by any director or registered officer signing any declaration, account or statement under the act, knowing the same to be false in any particular; or being otherwise guilty of any offence against the act (h).

(a) Sects. 4, 5.

(b) Sect. 6.

(c) Sect. 7.

(d) Sects. 8, 9.

(e) Sect. 10.

(f) Sects. 11, 12.

(g) Sect. 14.

(h) Sects. 15, 16, 17.

Nothing in the act, or in any account, statement or declaration under it, affects in any action or suit any question respecting any loan, debt, liability, mortgage, bond or debenture stock, as between a railway company or any director or officer of a railway company on the one side, and any person or class of persons on the other side (i). And an account, statement or declaration under the act is not admissible as evidence in favour of a railway company of the truth of any matter therein stated (k).

Nothing to affect liabilities of company, &c.

The particulars required to be specified in the half-yearly account under section 5 are—

1827.

Particulars of loan capital.

- (1.) The statutes under the powers of which the company have contracted any mortgage or bond debt, existing at the end of the half-year, or have issued any debenture stock then existing, or under which any then existing mortgage or bond debt or debenture stock has been confirmed, or under which they have any subsisting power to contract any mortgage or bond debt, or to issue any debenture stock, either on fulfilment of any condition or otherwise.
- (2.) The amounts of the mortgage or bond debt or debenture stock thereby authorized or confirmed.
- (3.) Whether or not by any such act or acts the obtaining the certificate of a justice or sheriff for any purpose, or the obtaining the assent of a meeting of the company, has been made a condition precedent to the exercise of the power thereby conferred, of borrowing on mortgage or bond, or of creating and issuing debenture stock.
- (4.) The date at which such condition has been fulfilled.
- (5.) The amount or aggregate amount under the powers of such act or acts actually borrowed up to the end of the half-year, on mortgage or bond (distinguishing them), and then being an existing debt, and of debenture stock actually issued up to that time and then existing.
- (6.) The amount or aggregate amount remaining to be borrowed. The second and every subsequent half-yearly account to show also,
- (7.) The items described in paragraphs (2) and (5) of this part of the present schedule for two consecutive half-years, and the increase or decrease of any of those items in the second of those half-years as compared with the first (l).

1828.

The particulars to be stated as to the new borrowing powers are—

Particulars of new borrowing powers.

- (1.) The act of parliament conferring the power to borrow on mortgage or bond, or to issue debenture stock, either on fulfilment of any condition or otherwise.

(i) Sect. 18.

(l) First Sched., Part I.

(k) Sect. 19.

- (2.) The amount of mortgage or bond debt or debenture stock thereby authorized.
- (3.) Whether or not by such act the obtaining a certificate of a justice or sheriff for any purpose, or the obtaining of the assent of a meeting of the company, has been made a condition precedent to the exercise of the power thereby conferred of borrowing on mortgage or bond, or of creating and issuing debenture stock.
- (4.) The date at which such condition has been fulfilled (*m*).

**1829.**

Declaration.

The declaration to be placed on mortgage deeds and bonds (each officer who signs declaring for himself) declares that the deed or bond is issued under the borrowing powers of the company as registered on the       day of       , and is not in excess of the amount there stated as remaining to be borrowed; with the necessary variations.

(*m*) First Sched., Part II.

## OF STAMPS UPON SECURITIES.

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ADDITIONAL or AUXILIARY SECURITY (1832) (1838).

AGREEMENT or CONTRACT accompanied with a deposit (1841).

ANNUITY (1831).

ASSIGNMENT or ASSIGNATION (1839).

BACK BOND (1841).

BILL OF SALE. See MORTGAGE.

1830.

Every affidavit (a), renewing the registration of a bill of sale, shall bear an adhesive common law stamp of the value of 5s.

A copy of a bill of sale is not to be filed in any court, unless the original, duly stamped, is produced to the proper officer (b).

BOND, COVENANT or INSTRUMENT of any kind whatsoever (c)—

1831.

(1.) Being the only or principal or primary security for any annuity (except upon the original creation thereof by way of sale or security), or of any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly-stamped instrument, nor rent reserved by a lease or tack.

For a definite and certain period, so that the total amount to be ultimately payable can be ascertained,

The same *ad valorem* duty as on a bond or covenant for such total amount.

For the term of life or any other indefinite period,

For every 5*l.*, and also for any fractional part of 5*l.* of the annuity or sum periodically payable, 2*s.* 6*d.*

1832.

(2.) Being a collateral or auxiliary or additional or substituted security for any of the above-mentioned purposes, where the principal or primary instrument is duly stamped.

(a) Bills of Sale Act, 1866, 29 & 30 Vict. c. 96, s. 6.

(b) Stamp Act, 1870, 33 & 34 Vict. c. 97, s. 57. It was held that the corresponding provision of 24 & 25 Vict. c. 91, s. 34, did not prevent the giving in evidence of a

bill of sale not duly stamped at the time of filing the copy, if the deficiency of duty and the penalty were paid. (*Bellamy v. Savill*, 4 B. & S. 265; 32 L. J., Q. B. 366.)

(c) Stamp Act, 1870, c. 97, Sch.

Where the total amount to be ultimately payable can be ascertained,

The same *ad valorem* duty as a bond or covenant of the same kind for such total amount.

In every other case,

For every 5*l.*, and also for any fractional part of 5*l.* of the annuity or sum periodically payable, 6*d.*

BOND accompanied with a deposit of title deeds for making a mortgage, wadset or other security on any estate or property therein comprised. See MORTGAGE.

#### BUILDING SOCIETY (1848).

- 1833.** COGNOVIT. A mere cognovit requires no stamp (*d*); but in certain cases it becomes liable to be stamped as an agreement. To create this liability, it seems that there must be mutuality in the agreement (*e*); and no liability arises by a mere stipulation that the defendant will take no advantage of the giving of the cognovit before declaration (*f*), or that time shall be given for payment (*g*), or that in default of payment on a certain day the plaintiff may sign final judgment and issue execution (*h*); though where the cognovit provided for payment of the debt by instalments, a stamp was held to be necessary (*i*).

#### COLLATERAL SECURITY (1832) (1845).

#### CONDITIONAL SURRENDER (1841).

#### COPYHOLD (1846).

COVENANT for securing the payment or repayment of money or the transfer or retransfer of stock (1837).

- 1834.** COVENANT (*k*). Any separate deed of covenant (not being an instrument chargeable with *ad valorem* duty as a conveyance on sale or mortgage), made on the sale or mortgage of any property and relating solely to the conveyance or enjoyment of, or the title to, the property sold or mortgaged, or to the production of the muniments of title relating thereto or to all or any of the matters aforesaid:

Where the *ad valorem* duty in respect of the consideration, or mortgage-money, does not exceed 10*s.*,

A duty equal to the amount of such *ad valorem* duty.

In any other case, 10*s.*

(*d*) *Ames v. Hill*, 2 B. & P. 150.

(*e*) Per Taunton, J., *Green v. Gray*, 1 Dowl. P. C. 150.

(*f*) *Green v. Gray*, *supra*.

(*g*) *Jay v. Warren*, 1 C. & P. 532; *Morley v. Hall*, 2 Dowl. P. C. 494.

(*h*) *Bray v. Hanson*, 8 M. & W. 668; but see *Ames v. Hill*, *supra*.

(*i*) *Reardon v. Swabey*, 4 East, 188.

(*k*) Stamp Act, 1870, 33 & 34 Vict. c. 97, Sched.

**DEBENTURE** for securing the payment or repayment of money or the transfer or retransfer of stock. See **MORTGAGE**.

**DEED** containing an obligation to infest any person in heritable subjects in Scotland, under a clause of reversion, as a security for money (1841).

**DEFEASANCE** of any conveyance, disposition, assignation or tack apparently absolute, but intended only as a security for money or stock (1841).

**DEPOSIT** of title deeds (1841).

**DISCHARGE** (1840).

**DISPOSITION** (1841).

**DUPLICATE** (*l*) or counterpart of any instrument, chargeable with any duty.

**1835.**

Where such duty does not amount to five shillings,

The same duty as the original instrument.

In any other case, 5*s*.

The duplicate or counterpart of an instrument chargeable with duty (except the counterpart not executed by the lessor or grantor of a lease), is not deemed duly stamped unless stamped as an original instrument, or unless it appears by some stamp thereon that the full duty has been paid on the original instrument (*m*).

**EIK** to a reversion (1841).

**EXEMPTIONS.** Instruments for the sale, transfer or other disposition, either absolutely or by way of mortgage or otherwise, of any ship or vessel, or any part, interest, share or property of or in any ship or vessel (*n*).

**1836.**

And see **BUILDING SOCIETIES** (1848); **LAND TAX SECURITIES** (1823).

**FOREIGN SECURITY.** See **MORTGAGE** (1849).

**FURTHER CHARGE** (1841) (1845).

**FUTURE ADVANCES** (1843).

**HERITABLE BOND** (1841).

**INSURANCE** (1843).

**MARKETABLE SECURITY** (1837) (1842).

(*l*) Stamp Act, 1870, c. 97, Sch.  
(*m*) *Id.* and s. 93.

(*n*) Stamp Act, 1870, Sched.  
"General Exemptions."

**1837.** MORTGAGE (*o*) (1841), BOND, DEBENTURE, COVENANT, WARRANT OF ATTORNEY to confess and enter up judgment, and FOREIGN SECURITY of any kind (except mortgage of any stock or marketable security):

(1.) Being the only or principal or primary security for—

The payment or repayment of money not exceeding 25l.	s.	d.
Exceeding 25l. and not exceeding 50l.	0	8
" 50l. " 100l.	1	3
" 100l. " 150l.	2	6
" 150l. " 200l.	3	9
" 200l. " 250l.	5	0
" 250l. " 300l.	6	3
" 300l.	7	6
For every 100l. and also for any fractional part of 100l. of such amount . . . . .	2	6

MORTGAGE of any stock or marketable security (*p*):

For every 5,000l. and also for any fractional part of 5,000l. of the amount secured . . . 10 0

**1838.** (2.) Being a collateral or auxiliary, or additional or substituted security, or by way of further assurance for the above-mentioned purpose, where the principal or primary security is duly stamped:

For every 100l., and also for any fractional part of 100l. of the amount secured . . . 0 6

**1839.** (3.) TRANSFER, ASSIGNMENT, DISPOSITION, or ASSIGNATION of any mortgage, bond, debenture, covenant, or foreign security, or of any money or stock secured by any such instrument, or by any warrant of attorney to enter up judgment, or by any judgment (1845):

For every 100l., and also for any fractional part of 100l. of the amount transferred, assigned, or disposed . . . . . 0 6

And also where any further money is added to the money already secured... The same duty as a principal security for such further money.

**1840.** (4.) RECONVEYANCE, RELEASE, DISCHARGE, SURRENDER, RESURRENDER, WARRANT TO VACATE, or RENUNCIATION of any such security as aforesaid, or of the benefit thereof, or of the money thereby secured (except release or discharge of a mortgage of stock or marketable security which is not chargeable with any *ad valorem* duty) (*p*):

For every 100l., and also for any fractional part of 100l. of the total amount or value of the money at any time secured . . . . . 0 6



The term mortgage, means (*q*) a security by way of mortgage for the payment of any definite and certain sum of money (*r*) advanced or lent at the time, or previously due and owing or foreborne to be paid, being payable, or for the repayment of money to be thereafter lent, advanced or paid, or which may become due upon an account current together with any sum already advanced or due, or without, as the case may be; and includes conditional surrender by way of mortgage, further charge, wadset, and heritable bond, disposition (*s*), assignation, or tack in security, and eik to a reversion of or affecting any lands, estate or property (*t*), real or personal, heritable or moveable, whatsoever (1843):

1841.

What instruments included under "mortgage."

Also any deed containing an obligation to infest any person in an annual rent, or in lands or other heritable subjects in Scotland under a clause of reversion, but without any personal bond or obligation therein contained for payment of the money or stock intended to be secured:

Obligation to infest.

Also any conveyance of any lands, estate or property, in trust, to be sold or otherwise converted into money, intended only as a security, and redeemable before the sale or other disposal thereof, either by express stipulation or otherwise;

Conveyance in trust for sale.

Except where such conveyance is made for the benefit of creditors generally or of creditors specified, who accept the provision made for payment of their debts in full satisfaction thereof, or who exceed five in number:

(*q*) Stamp Act, 1870, c. 97, s. 105.

(*r*) The definite and certain sum of money here referred to is the principal sum secured without regard to interest, although interest be secured from a day prior to the date of the security; provided, it seems, it do not appear on the deed that interest was then due. Held as to 55 Geo. 3, *Barker v. Smark*, 7 M. & W. 590; on a bond, *Davies v. Heath*, 3 C. B. 938. And, under the same act, without regard to money which the mortgagee in that character is entitled to receive, and which is only a charge on the property, and does not constitute a debt recoverable at law between the parties. Such are costs incurred in recovering the debt with interest (*Doe d. Scruton v. Snaith*, 8 Bing. 146; 1 Moore & S. 230); taxes payable in respect of the mortgaged property or debt, and interest (*Doe d. Mercer v. Bragg*, 8 A. & E. 620); costs incurred in the renewal of leases or otherwise (*Wroughton v. Turtle*, 11 M. & W. 561; 3 Nev.

& P. 644; 1 D. & L. 473; *Lysaght (Lessee of) v. Cuneady*, 10 Ir. L. R. 269); and premiums on policies and costs of obtaining new policies. (*Lawrence v. Boston*, 7 Exch. 28; 21 L. J., Ex. 49 (1843).) And the stamp was held sufficient, though an uncertain sum not otherwise recoverable was charged, where it was not shown that the amount of it with the principal debt would exceed the sum for which the deed was stamped. (*Paddon v. Bartlett*, 2 A. & E. 9; 5 N. & M. 1. See also *Watson v. Macquiere*, 5 C. B. 836.)

(*s*) This is a technical word, which refers only to a Scotch instrument. (*Harris v. Birch*, 9 M. & W. 591.)

(*t*) A policy of insurance is property within the Stamp Act. (*Caldwell v. Dawson*, 5 Exch. 1; 55 Geo. 3, c. 184.) So of the goodwill of a trade. (*Potter v. Commissioners of Inland Revenue*, 10 Exch. 147.)

Defeasance, &c.;

*Also* any defeasance, letter of reversion, back bond, declaration or other deed or writing, for defeating or making redeemable, or explaining or qualifying, any conveyance, disposition, assignation or tack of any lands, estate or property, whatsoever, apparently absolute, but intended only as a security:

Agreement with deposit of deeds.

*Also* any agreement, contract or bond, accompanied with a deposit of title deeds for making a mortgage, wadset or any such other security or conveyance as aforesaid, of any lands, estate or property, comprised in such title deeds, or for pledging or charging the same as a security (u):

Deposit under Land Transfer Act, 1862.

*This* includes an agreement or memorandum in writing, relating to the deposit of a land certificate under the Transfer of Land Act, 1862, for the purpose of creating a lien on the estate and interest of the depositor (v):

Real burden in Scotland.

*Also* any deed whereby a real burden is declared or created on lands or heritable subjects in Scotland.

## 1842.

Duty on transfer of stock.

A security (x) for the transfer or retransfer of any stock is to be charged with the same duty as a similar security for a sum of money equal in amount to the value of such stock; and a transfer, assignment, disposition or assignation of any such security, and a reconveyance, release, discharge, surrender, resurrender, warrant to vacate or renunciation of any such security shall be charged with the same duty as an instrument of the same description relating to a sum of money equal in amount to the value of such stock.

## 1843.

Duty on security for future advances.

(1.) A security (y) for the payment or repayment of money to be lent, advanced or paid, or which may become due upon an account current, either with or without money previously due, is to be charged, where the total amount secured or to be ultimately recoverable is in any way limited, with the same duty as a security for the amount so limited:

(u) The liability to a mortgage stamp is not created by a memorandum with deposit of title deeds by way of security, merely containing a record of the purpose for which the deposit was made. (*Meek v. Bayliss*, 31 L. J., Ch. 448.) Nor by the delivery of a bill of lading and policy of insurance for goods, with a letter making them a security for advances, although the memorandum confer a power of sale. (*Harris v. Birch*, 9 M. & W. 591; 1 Dowl. N. S. 899; *Attenborough, Re*, 11 Exch. 461; 25 L. J., Ex. 22.) Nor by a document confirming distresses and other proceedings by the lender respecting property, the

deeds of which had been previously deposited with him. (*Pyle v. Partridge*, 15 M. & W. 20.) A bond has been held to be sufficiently stamped as a simple bond for the retransfer of stock, though accompanied by a collateral security insufficiently stamped; and a bond to replace stock accompanied by a deposit of title deeds is not liable to a mortgage stamp as a bond for making a mortgage. (*Blair v. Ormond*, 14 Q. B. 732; 14 Jur. 191; held under like words in 48 Geo. 3, c. 149, Sched. *Mortgages*.)

(v) 25 & 26 Vict. c. 53, s. 73.

(w) Stamp Act, 1870, c. 97, s. 106.

(y) Id. s. 107.

(2.) Where such total amount is unlimited, the security is to be available for such an amount only as the *ad valorem* duty impressed thereon extends to cover:

(3.) Provided that no money to be advanced for the insurance of any property comprised in any such security against damage by fire, or for keeping up any policy of life insurance comprised in such security, or for effecting in lieu thereof any new policy, or for the renewal of any grant or lease of any property comprised in such security, upon the dropping of any life whereon such property is held, shall be reckoned as forming part of the amount in respect whereof the security is chargeable with *ad valorem* duty.

A security (z) for the payment of any rent-charge, annuity or periodical payments, by way of repayment, or in satisfaction or discharge of any loan, advance or payment, intended to be so repaid, satisfied or discharged, is to be charged with the same duty as a similar security for the payment of the sum of money so lent, advanced or paid.

**1844.**

Duty on security for rent-charge, &c.

No transfer (a) of a duly-stamped security and no security by way of further charge for money or stock, added to money or stock previously secured by a duly-stamped instrument, is to be charged with any duty by reason of containing any further or additional security for the money or stock transferred or previously secured, or the interest or dividends thereof, or any new covenant, proviso, power, stipulation or agreement in relation thereto, or any further assurance of the property comprised in the transferred or previous security.

**1845.**

Duty on transfer of security.

(1.) Where (b) any copyhold or customary lands or hereditaments are mortgaged alone by means of a conditional surrender or grant (2138), the *ad valorem* duty is to be charged on the surrender or grant, if made out of court, or the memorandum thereof, and on the copy of court roll of the surrender or grant if made in court:

**1846.**

Duty on mortgages of copyholds alone.

(2.) Where any copyhold or customary lands or hereditaments are mortgaged together with other property, for securing the same money, or the same stock or funds before mentioned, the *ad valorem* duty is to be charged on the instrument relating to the other property; and the surrender or grant or the memorandum thereof, or the copy of court roll of the surrender or grant, as the case may be, is to be charged with duty as if the surrender or grant were not made upon a mortgage; but such last-mentioned duty shall not exceed the said *ad valorem* duty.

With other property.

An instrument (c) chargeable with *ad valorem* duty as a mortgage is not to be charged with any other duty by reason of the equity of redemption in the mortgaged property being thereby conveyed or

**1847.**

Duty on settlement of equity of redemption.

(z) Id. s. 108.  
(a) Id. s. 109.

(b) Id. s. 110.  
(c) Id. s. 111.

limited in any other manner than to, or in trust for, or according to the direction of, a purchaser (? mortgagor).

**1848.**

Duty on securities to building societies.

The exemption (*d*) from stamp duty conferred by the act of the sixth and seventh years of King William the Fourth, chapter thirty-two, for the regulation of benefit building societies, shall not extend to any mortgage to be made after the passing of this act, except a mortgage by a member of a benefit building society for securing the repayment to the society of money not exceeding five hundred pounds.

**1849.**

Meaning of "foreign security."

The term (*e*) "foreign security" means and includes every security for money by or on behalf of any foreign or colonial state, government, municipal body, corporation or company, bearing date or signed after the 3rd day of June, 1862 (except an instrument chargeable with duty as a bill of exchange or promissory note),—

- (1.) Which is made or issued in the United Kingdom (*f*); or
- (2.) Which, the interest thereon being payable in the United Kingdom, is assigned, transferred or in any manner negotiated in the United Kingdom.

**1850.**

Penalty.

Every person (*g*) who in the United Kingdom makes, issues, assigns, transfers or negotiates any foreign security, not being duly stamped, shall forfeit the sum of twenty pounds.

**1851.**

Power to stamp foreign securities.

The commissioners (*h*) may at any time, without reference to the date thereof, allow any foreign security to be stamped without the payment of any penalty, upon being satisfied in any manner that they may think proper, that it was not made or issued, and has not been transferred, assigned or negotiated within the United Kingdom, and that no interest has been paid thereon within the United Kingdom.

RECONVEYANCE (1840).

RELEASE (1840).

RENUNCIATION (1840).

RESURRENDER (1840).

SETTLEMENT of equity of redemption (1847).

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SURRENDER (1840) (1841).

(*d*) Stamp Act, 1870, c. 97, s. 112.

(*e*) Stamp Act, 1871, c. 4, s. 2.

(*f*) See *Grenfell v. Commissioners of Inland Revenue*, L. R.,

1 Ex. Div. 242.

(*g*) Stamp Act, 1871, c. 4, s. 3.

(*h*) Stamp Act, 1870, c. 97, s. 115.

TACK IN SECURITY (1841).

TRANSFER (1845).

TRANSFER OF LAND ACT (1841).

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WARRANT OF ATTORNEY (*i*) to confess and enter up a judgment given as a security for the payment or repayment of money or for the transfer or retransfer of stock. See MORTGAGE.

WARRANT TO VACATE (1840).

(*i*) The defeasance on a warrant of attorney is part of it, and does not require an additional stamp as an agreement. (*Canthorne v. Holben*, 1 B. & P., N. R. 279.)



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